APPENDIX.

EASTERN KENTUCKY COAL LANDS CORPORATION v. COMMONWEALTH OF KENTUCKY (FOUR CASES).

Appeals from Pike Circuit Court, Floyd Circuit Court, Knott Circuit Court and Letcher Circuit Court.

Opinion of the court by Chief Justice O'Rear, affirming.

These four appeals presenting a common question are heard together. They involve the constitutionality and construction of article 3 of the revenue law passed by the General Assembly of 1906.

For a full study and understanding of that article it is set out complete, and is as follows:

"Section 1. It shall be the duty of every owner or claimant of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided.

"The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not relieve against the duty herein imposed.

"If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were or should have been made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall be cause for the forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall, within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the nonpayment of taxes.

"Section 2. The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition verified by himself or his agents, filed in said court on or before January 1, 1907, in which the land, sought to be charged shall be described, so as to be indentified, and the years for which it was not listed and the years in which the taxes were not paid shall be stated, and in which also shall be stated the grant under which he claims, if he derives title from

a grant, and the instrument through or the manner in which the title devolved upon him. Said application shall be set for hearing upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, of which he shall give at least ten days' written notice to the county attorney, whose duty it shall be to attend said hearing and represent the State and county; for which service he shall receive as compensation ten per centum of the amount ultimately collected by sale or otherwise, by virtue of such delinquency.

"It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered, having due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and State purposes at the rates fixed by law for such years; and shall cause a record of the findings to be made on the order book of the court, and certified to the Auditor of the State and county clerk. Should the court find that the land had been assessed against such owner or claimant, or those under whom he claims, as of any of said dates, it shall accept such assessments as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made.

"Either the petitioner or the Commonwealth, feeling aggrieved by the finding of the county court, shall have the right to take an appeal, within thirty days after the entry of the finding of the county court, to the circuit court for said county, in the manner that other appeals are taken, except that no bond shall be required of the Commonwealth.

"It shall be the duty of the circuit court to hear and determine said application de novo, and to give it pre-

cedence over all other civil business in said court. The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State and to the clerk of the county court.

"As soon as the time for appealing from the finding of the county court has expired, if no appeal is taken, or as soon as the final order of the circuit court is entered, if an appeal is taken, the obligation of said owner or claimant to pay the taxes therein called for, with interest and penalties, as provided by law for the redemption of land sold for the non-payment of taxes, shall be complete; and the same shall be paid to the sheriff of the county within thirty days thereafter: Provided, however, That if in a proceeding hereunder begun within the time allowed, the amount payable by the delinquent shall not be finally determined until within less than thirty days before March 1st, 1907, or until after said date, then the right of forfeiture as set out in Section 1 of this article, shall not be complete in the Commonwealth, unless and until said delinquent shall have failed to pay said amount, interest and penalties, for thirty days after the entry of said order.

"Upon collecting said taxes, interest and penalties, the sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the Auditor of the State and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. Out of the amount so paid, there shall be paid to the county attorney ten per centum thereof and an additional ten per centum to the Commonwealth's attorney, should an appeal have been prosecuted to the circuit court.

"Section 3. If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or

claimant of any such tract of land, as provided and within the time prescribed in Sections 1 and 2 of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the circuit court of the county in which said land or any part thereof lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them; if their names are unknown to him, designating them as the unknown owners and claimants thereof for the purpose of declaring the title or claim of said defendants forfeited to this Commonwealth and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable.

"In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object.

"The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner be affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described.

"The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff.

"Judgments rendered by the circuit court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subjected to the provisions of Sections 391, 410, 414 or 574 of the Civil Code of Practice. Issues as to whether or not the title and claim sought to be forfeited is or has been subjected to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

"Either party may prosecute an appeal from such judgment to the Court of Appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the Court of Appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth.

"Section 4. If, before or during the term of the circuit court next succeeding the term at which a judgment of forfeiture may have been entered, as authorized

by section 3 of this article, any of the said defendants in privity with the title so forfeited to, and vested in the Commonwealth, file his counter-claim in said section accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform the judgment that the court may enter upon such counter-claim, and in said counter-claim offer to purchase back from the Commonwealth the title and claim in said action so forfeited to and vested in, the Commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon proper pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged and that ought to have been charged against the defendant and those under whom he claims, as the owner or claimant of said land, for fifty years immediately preceding the filing of such counter-claim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth, to enter a judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of said land, for said fifty years, together with interest thereupon at the rate of 15 per cent per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable attorney fee for the Commonwealth's attorney, to be fixed by the court: Provided, That no person except a defendant, and no defendant, except as herein provided, shall be allowed to purchase back from the Commonwealth the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment.

"If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter judgment retransferring to such defendant the title and claim so forfeited to, and vested in, the Commonwealth; and said judgment shall have the effect of retransferring and vesting same in said defendant without the execution of deed or other instrument.

"Should such defendant not thereupon pay said judgment, the court shall thereupon enter an order directing the sale of the said title and claim as in section 7 of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions thereunder; and the remainder, if any, shall be paid to the State and county as provided in this article, and the counter-claim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fee for the Commonwealth and county attorney, to be fixed by the court.

"If at any time during the pendency of said action it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk is insufficient, additional security should be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counter-claim shall be dismissed.

"Appeal may be prosecuted to the Court of Appeals from the judgment of the circuit court under this section within the time and in the manner and subject to all the conditions provided for appeals in section 3 of this article, except that the judgment of the circuit court as to the amount thereof shall be final and not subject to appeal.

"All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the Auditor of the State and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the

same responsibilities of himself and his bondsmen as in the case of taxes collected by him: Provided, That fees required by law to be paid to the auditor shall be paid to him by the sheriff, and by the auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the Commonwealth's attorney in all proceedings under this article, for which he shall be allowed the per centum as herein provided. Certified copies of the judgments of the circuit court, under sections 3 and 4 hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies, and indexed as deeds are required to be indexed.

"Section 5. Any owner or claimant who instituted a proceeding allowed by section 2 of this article, and who did not, within the time herein limited, pay the amount herein ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of said land, shall not be allowed the right to purchase back, under the proceedings authorized by section 4 of this article, such title or claim so forfeited to, and vested in, the Commonwealth.

"Section 6. All title and claim proceeded against under this article and forfeited to, and vested in, the Commonwealth and not purchased back by the owner or claimant thereof, as authorized in section 4 hereof, whether such forfeiture be for the past delinquencies or for future delinquencies as authorized under section 10, hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment or forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims shall have paid taxes thereupon for five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

"Section 7. All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant as provided by section 4, and not vested in the occupant, as provided in section 6, shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the court house on the first day of some regular term of the circuit court, after notice of sale shall have been advertised in the manner required by law in the case of sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commissioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and claim to the land so forfeited and transferred to, and vested in the Commonwealth as remains in it and after the operation of section 6 of this article, and shall so recite.

"The money realized from the sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including commissioner's fee as fixed by law and a reasonable attorney's fee, to be fixed by the court and paid in the manner provided by law; second, to the county and State the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representative or assignees.

"Section 8. No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto.

"Section 9. No owner or claimant of any land in this Commonwealth shall be allowed to prevent the operation of this article by the payment, after January 1st, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged, and that should have been charged against said owner

or claimant of said land and those under whom he claims, as of each and all of said five dates, first mentioned in section 1, hereof; and where such payment is made after the passage of this act, the amount to be paid shall be ascertained and payment made, as in this article provided.

"Section 10. When, for any successive five years after the first day of August, 1906, any owner or claimant of or to any land in this Commonwealth shall fail to list same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to, and vesting it in, the Commonwealth of Kentucky. And wherever such failure exists, it shall be the duty of the Commonwealth's attorney to institute an equitable action in the circuit court of the county wherein the said land, or a part thereof, lies, for the purpose of declaring said forfeiture and vesting said title and claim thereto in the Commonwealth of Kentucky, and for the sale of such parts thereof as, under the provisions of this article, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as the same may be applicable."

It is also proper, and perhaps necessary, to set out here so much history of the State as will disclose the evil sought to be remedied by this act, in order that the legislative purposes may be more surely devined.

While prior to 1779 a considerable quantity of the wild lands of Virginia, west of the Allegheny mountains had been appropriated by patents under the stimulus of enterprising adventurers and the policy of the colony to encourage emigration and the settlement of the vast wilderness territory then inhabited almost exclusively by savages, it was after the war of the revolution, when the returning soldiers from the Continental army were to be compensated in a measure by such favor, as the State could bestow, that the real tide of emigration to the west

set in. In 1779 Virginia established a land office, and created the office of register of the land office. Most liberal inducements were offered settlers of "waste and unappropriated lands." There was no limit to the quantity any person might appropriate. Surveyors were appointed for the western territory upon the nomination of the President and Professors of William and Mary College. They were required to make records of entries and surveys under them. Their peripatetic offices were widely scattered. The territory opened up for settlement under this act was that part of Virginia south of Ohio river, east of Green river, west of the Cumberland mountains and north of the Carolina line, excepting certain Indian reservations. In other words, it comprised all of the eastern and most of the central part of what is now the State of Kentucky. The surveyors so appointed could appoint any number of deputies, and did appoint a great many. Aside from the lack of roads and the difficulties of travel in a region of unbroken forests, with great rivers and mountains to be traversed, the dangers from bands of roving savages and wild beasts that infested that vast region, made intercommunication between these officers both difficult and dangerous. (2 Collins' History of Kentucky, 552, 563.) There was a constantly growing tide of immigration into the newly opened territory. Many of the immigrants, probably the most of them, were intending settlers. But, as might have been expected, speculators and adventurers not a few were attracted thither by the glowing accounts which were carried back to the older settlements in the east. Large tracts, some of them for many hundred thousand acres, were entered, located and surveyed, while many thousand smaller tracts designed of immediate or present actual settlement, were taken up at the same time. So rapid was the growth of population that in 1790 the white population of that territory which later became the State of Kentucky, was 61,000. (1 Marshall Hist. of Ky. 441.) These people, so far removed from their seat of government, and so imperfectly protected,

as was inevitable under the existing conditions, were clamorous for a separate and independent State government. On the 18th day of December, 1789, Virginia indicated by an act of her assembly the terms on which she would consent to part with her sovereignty over the new territory. This was agreed to, and is what is known as the Virginia compact. It was even then foreseen that conflicts would arise concerning the grants of land already made, or the initial steps of which had been begun. Perhaps the delay experienced by the Kentucky pioneers in obtaining the consent of the mother State for a separation, was due to the influence of those who had taken up large boundaries of land in Kentucky for speculative purposes. At any rate, the compact abounds with evidence of the fact that controversies among claimants and settlers concerning the validity and location of these entries had already arisen in considerable numbers, and were then also foreseen as future problems. The compact, in so far as material in this investigation, read:

"Section 7. Third, that all private rights and interests of lands within the said district, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.

"Section 9. Fifth, that no grant of land or land warrant to be issued by the proposed State, shall interfere with any warrant heretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, one thousand seven hundred and ninety-one.

"Section 10. Sixth, that the unlocated lands within the said district, which stand appropriated to individuals, or description of individuals, by the laws of this Commonwealth, for military or other services, shall be exempted from the disposition of the proposed State, and shall remain subject to be disposed of by the Commonwealth

of Virginia, according to such appropriation, until the first day of May, one thousand seven hundred and ninety-two, and no longer; thereafter the residue of all lands remaining within the limits of the said district, shall be subject to the disposition of the proposed State.

"Section 14. And be it further enacted, that if the said convention shall approve of the erection of the said district into an independent State, on the foregoing terms and conditions, they shall and may proceed to fix a day posterior to the first day of November, one thousand seven hundred and ninety-one, on which the authority of this Commonwealth, and of its laws, under the exceptions aforesaid, shall cease and determine forever over the proposed State, and the said articles becomes a solemn compact mutually binding on the parties, and unalterable by either without the consent of the other."

At a convention called for the purpose of considering the proposal, the compact was accepted by the District of Kentucky, as the new territory was then called, on July 20th, 1790. An act of Congress, February 4, 1791, provided for admitting the new State into the Union, which was consumated in June, 1792.

The early records of this court, and of its predecessor, the Supreme Court of the District of Kentucky (Hughes, Reports), abound in evidence of the confusion into which the land titles of the young Commonwealth had fallen, even before it was launched as a State. It is easy to gather from these records that not the least of the difficulties with which the new State had to deal was the tangled condition of one of the most important features of its society, namely, the status and validity of the titles to its lands. The handicap was serious, and has been persistent. The system was loose and uncertain, admitting not only of honest mistakes, but of easy opportunities for frauds and oppression. It was peculiarly adapted to the purposes of mere speculation. The system of entering and surveying unappropriated lands was,

unhappily, though not unnaturally, brought over into the new State and continued.

Indeed, in the first Constitution, adopted April 16, 1792, it was provided, section 6 of articles 8: "All laws now in force in the State of Virginia, not inconsistent with this Constitution, which are of a general nature, and not local to the eastern part of that State, shall be in force in this State until they shall be alterated or repealed by the legislature."

And the book of the statute laws of Kentucky for years thereafter was Mr. Littell's Statutes, compiled from the Virginia Statutes, and the first legislative enactments of the new State.

Provision was at once made for transferring from the records of Virginia the evidence of grants and conveyances of lands in the old District of Kentucky. They were required to be deposited as part of the records of the office of the clerk of this court at the seat of the State government, removed a week's travel at that time from the State's eastern domain. Under the existing system, and for the supposed convenience of proposed settlers, the records of new entries and surveys were kept by the county surveyor, although it does not appear that they were required to maintain public or permanent offices at the various county seats.

Many, may be most, of the pioneer settlers of this State, were unlearned "backwoodsmen." Perhaps many of the local surveyors were but little advanced in education. Vacant lands were supposed to be plentiful. Consequently land was then the cheapest of commodities, if it might be so called. Many a noble estate, as it is now, passed then in exchange for a rifle, gun or a powder flask. As new counties came to be formed, as they were rapidly enough, new county seats, with new offices and new records (without provision for transcribing the old in so far as they affected the new counties), were created, and were doubtless most generally supposed to contain all necessary data for the guidance of the settlers in taking up and conveying land. It resulted that new

patents were issued for lands already appropriated by previous grants. In many instances several patents overlapped the same land. This went on with little change for nearly a hundred years. The recent and present occupants were innocent enough of knowledge or purpose, it may be safely assumed, to do ought than follow the course of the law, buying from the State in confidence, and selling among themselves with assurance that which they had bought paid for, and a great sacrifice of labor, means and care, erected into permanent homes. It now develops, and has been known for some time, that all or most of the vast territory lying to the northwest of the Cumberland mountains, and west of the Tug Fork of Big Sandy river, to a point west of the Main Kentucky river, was appropriated under entries and surveys made by virtue of the laws of Virginia before the separation in 1792. Few of those entries were ever settled upon. So far as the new settlers knew in fact, in every probability, the lands were unappropriated. The generations of a century have thus increased, and by actual occupancy, by personal industry and thrift, and by all the means by which Americans create a Commonwealth, they have fastened themselves to the soil in the belief that they have inherited it from their fathers, or purchased it honestly from their neighbors, and that it is theirs. Notwithstanding that millions of acres have thus been reduced to that kind of actual possession and for such a period as to ripen into a perfect title in spite of its original state, and that the population of this territory is now more than 300,000, there are many hundred thousand acres of these lands unfenced, whose stores of mineral and mantels of forest have remained in their natural state until the present hour. Commercial necessity and enterprise in recent years are opening this region to the markets, and what was once of small value, has become enormously important and valuable.

The holders of these old grants during all these years have taken no part in the development of the section where these lands lie, nor done ought to add to the State's

strength and stability in peace or in war. They have contributed nothing in clearing the lands for settlement. They have not tenanted them. They have not worked them. Every consideration to the government (save the pittance paid into the treasury for the warrants) which entered into the grant by the State, and has been withheld or disappointed by the grantees and those claiming under them. The State was then and is yet concerned in the subject of actual settlement, of homesteaders tied by interest and patriotism to the State's welfare. It was from the first and is yet a proper subject of public concern that these lands be seated by settlers, to the end at least, if no greater, that the State might derive taxes from them for its support.

While the people in that section may have been unmindful of the underlying insecurity of their titles, the subject has been one of constant concern to the State. The situation was one of practical difficulties. On the one side was the legal right of the original patentees. On the other was the moral right of those who had, in ignorance of the truth, bought and settled upon some parts of these same lands. Besides, it all, was the compact with Virginia, an international agreement in its nature, the legal effect of which, from environment and circumstances, was little understood in the State. There was the purpose to live up to the spirit of the compact in good faith, and fear of its letter. Let us now follow in a brief review the course of legislative and judicial cognizance of the situation.

On June 26th, 1792, the General Assembly of this State (1st Littell's Laws of Ky., 63), enacted a statute, by the 14th section of which it was provided that all lands of which a list shall not be given in by the owner or proprietor to the commissioner on or before Feb. 4th, 1795, and on which taxes with interest should not be paid, should be considered as, and actually be, forfeited to the State, and should be disposed of in such manner as should be directed by law. In 1801, the legislature extending the time to save forfeiture, re-enacted the

forfeiture-clause. (2 Morehead & Brown, 1072.) This court, construing that statute in 1822, held that the act did not, properly construed, dispense with an inquisition of office found, and that forfeiture was not worked by the mere operation of the statute. (Barbour v. Nelson, 1st Litt., 60.)

In 1812 the act known as the "occupying claimants law" was adopted, which in 1823 was held unconstitutional by the Supreme Court of the United States in Green v. Biddle, 8 Wheat. 1, though by a divided court.

In 1824 the act known as "The seating and improvement bill," was adopted, requiring the fencing of a certain portion of each tract of 1,000 acres or more, under penalty of forfeiture. (2 Morehead & Brown, 1074.) This act was held unconstitutional in Gaines v. Buford, 1 Dana, 481, the chief justice not sitting, and the two remaining judges writing divergent opinions as to the reasons upon which the court's action was based. These opinions, and that of the Supreme Court in Green v. Biddle, as well as certain resolutions of the General Assembly of Kentucky, adopted January 11th, 1825 (vide Acts 1824, pp. 275, 278), all indicate an unsettled state or judicial and legislative opinion as to the precise effect of the compact as limiting the power of Kentucky in passing laws upon these subjects.

On January 12th, 1825, the forfeiture laws, on account of non-listing of lands for taxation, were re-enacted with the additional provision (doubtless moved by the court's language in Barbour v. Nelson, supra), that the forfeited title should be transferred to the Commonwealth without office found.

In February, 1828 (2 Morehead & Brown, 1081), it was enacted that all title forfeited to the Commonwealth for failure to list property for taxation, should inure to the benefit of the occupant in possession.

These latter acts were carried forward into the general revision of 1890 (chapters 58, 59, 2 Rev. Stats., pp. 103, 106), and by the act of 1860 (2 Rev. Stats., 757), it was enacted that land forfeited prior to 1834 should

remain unredeemable. It was evidently thought by the legislature that the provisions of the act of 1825 were valid, as they had not been questioned judicially up to that time.

In the revision of 1873 (Sec. 1, article 17, chapter 92, Ky. Stats.), the same provision was made for the forfeiture of lands not listed and tax paid.

In 1878 a case came before this court in which was involved the constitutionality of the provisions above cited relating to forfeitures without office found. (Marshall v. McDaniel, 12 Bush, 378.) It was there held by this court that such attempt to forfeit was unconstitutional; that the land owner must first have his day in court.

Thus the matter stood when the convention of 1890 met to revise the Constitution. This subject was deemed of enough importance to justify the creation of a special committee on "Land Titles." Various proposals were made to the convention among others, one by the member from Wolfe, Powell, Menifee and Montgomery, embodying substantially the same provision as is contained in the act which is the subject of this opinion. The result of the deliberations of the convention was section 251, of the present Constitution. The debates show that the delegates were alive to the very evil which is herein set forth, and which we will see was presented to the legislature in 1906 for its consideration. Section 251 of the Constitution, as finally adopted, reads:

"No action shall be maintained for possession of any lands lying within this State, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the Commonwealth of Virginia, or by the Commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any person claiming such lands by possession to a well defined boundary, under a title of record, unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession; but nothing herein shall be construed to affect any right, title or interest in lands ac-

quired by virtue of adverse possession under the laws in this Commonwealth."

Doubtless the moving cause of the adoption of this provision, one of limitation, instead of the one proposed by the delegate from Wolfe, Menifee, Powell and Montgomery, was that the Supreme Court of the United States had held that this State could legally enact a shorter limitation than existed under the laws of Virginia in 1790. (Hawkins v. Barney, 5 Pet. 457, this court holding the same way in Board v. Smith, 6 T. B. Mon. 430), whereas, neither court had up to that time passed upon the validity of a statute such as is now being considered.

The first legislature after the new Constitution of 1891 also attempted to help out the situation along the same line. It enacted Sec. 2377, Ky. Stats., providing that no one should maintain an action in ejectment upon a patent issued prior to 1820 who had not paid twenty years taxes on his title.

But this court in 1901, in Shaw v. Robinson, 111 Ky. 715; 23 Ky. Law Rep., 998; 64 S. W., 620; construed the language "Title of record," of section 251, Constitution, to mean a title from the Commonwealth upon a valid patent, and denounced Sec. 2377, Ky. Stats., supra, as unconstitutional upon the ground stated in Marshall v. McDaniel.

Thus we see that from the beginning this State has been endeavoring to rid itself of the incubus caused by the dormant titles and inactive owners or claimants who refused, or at least persistently failed, to do anything toward supporting the State government, or allowing the property which they claimed, to do so. We also see that notwithstanding the public insistence and the important question of governmental policy involved, this court has from the start adhered to the strictest construction of the terms of the compact and of the constitutional rights of the delinquent, so as to afford them every chance to come forward and save whatever title or claim they had. And yet they did nothing.

It will be remembered that in Virginia there was substantially the same state of affairs as in parts of Kentucky, for that region lying between the Allegheny mountains and the borders of Kentucky was of the same character of land, and had been appropriated by the same methods and under the same system, and at or about the same time, as had the lands in Kentucky. Naturally, the same result ensued.

In 1790 the Commonwealth of Virginia enacted a statute (13 Hennings Statutes at Large, 116, section 5), by which title to lands not tax-paid for three years were "forfeited and vested in the Commonwealth." The act was extended and re-enacted in increasing vigor in 1792, 1803, and 1810. In 1835 a still more drastic act was adopted (Hutchinson on Land Titles of Virginia and West Virginia, 62), the salient features of which are incorporated in the act of Kentucky now being investigated, except that in the Virginia Act there is no provision for an inquisition of office, or its equivalent, as there is in the Kentucky Statutes. This act has been before the Supreme Court of Appeals of Virginia a number of times, and has always been upheld as constitutional. (Wilds v. Serpell, 10 Gratt., 408; Staats v. Board, 10 Gratt. 400; Smith v. Chapman, 10 Gratt. 445; and Hale v. Branscum, 10 Gratt. 418.)

West Virginia was erected into a State in 1863. All of her territory was carved out of Old Virginia, and was wholly within the zone affected by the system of grants above discussed. In her Constitution is a provision in every feature or principle the same as the Kentucky Statute of 1906, except in the West Virginia Constitution there is not a provision for a trial in court concerning the proposed forfeiture. (Article 13, Sections 1-6, W. Va., Constitution.)

The Supreme Court of West Virginia had also upheld the forfeiture provisions as not depriving the land owner of his property without due process of law, and as being not only just, but wise and politic legislation. (McClure v. Maitland, 24 W. Va., 561; McClure v. Mau-

perture, 29 W. Va., 633; Twiggs v. Schovallie, 4 W. Va., 463; Smith v. Tharp, 17 W. Va., 221; Hays v. Camden, 38 W. Va., 109; Wyant v. Hays, 38 W. Va., 681; State v. Sponaugle, 45 W. Va., 420.) The question arose in a case which was before the Supreme Court of the United States in 1898 (King v. Mullins, 171 U. S., 404), whether the West Virginia provision was repugant to the Federal Constitution as depriving one of his property without due process of law. The court recognized that the term "due process of law" as used in the Federal Constitution, must mean the same thing throughout the Union. It also held that the term might be satisfied with a different provision for a hearing as concerned tax matters, from what would be required in a controversy between individuals. The court refused to say that the provisions of the West Virginia Constitution, and of the statutes of Virginia, forfeiting the title to land without office found for the non-listing and non-payment of taxes by their claimants, was repugnant to the "due process of law" guaranty of the Federal Constitution. But the court did say, as being all that was necessary to a decision of the case in hand, that inasmuch as there was a provision in the statute of West Virginia by which the lands forfeited under the Constitution of that State were sold under a decree of a court, in an action to which the former owner was made a party, and in which he was allowed to redeem on certain contingencies, it was in every sense a sufficient compliance with the requirement that the owner be given a day in which to contest the proposed forfeiture. The West Virginia provision was therefore upheld.

Thus we see that in 1906 the legislature was confronted with this situation: Every evil that had existed from the beginning threatening the stability of the land titles of a large and important section of that State, was still unalleviated; that every legislative measure adopted during the past 115 years had been unavailing; that in spite of their public duty, and of the imperative command of the law and needs of the State, these claimants refused

to respond, and were beyond the reach of the law then in existence; that the reason of the failure of the previous legislation upon the subject, were those constitutional obstacles which had been pointed out in various opinions of this court and of the Supreme Court of the United States; that similar conditions produced by the same cause had existed in two of our sister States; that they had gone further than Kentucky had in an attempt to relieve the situation, and that their efforts had been successful, and were without legal exception. The idea was not new to the legislature than the duty of the Commonwealth was to protect herself from a continuation of that thrall that was paralyzing the energies of a large section of the State, disturbing its peace, and robbing the State treasury of its revenues. Thereupon article 3, of the act of 1906, was most deliberately adopted. The revenue laws of Kentucky, in the opinion of the previous legislature, needed radical revision. A commission was raised to study the question, to hear complaints and suggestions, and to bring in at the next session a new bill covering the entire subject. Two years were allowed for the work. The committee did as directed. The whole system of the State's revenue laws was revised, and an entirely new, complete measure introduced and enacted. (Acts 1906, pp. 88 to 248.) Article 3, as quoted above, was in this deliberate manner proposed and adopted. There can be no doubt that the legislature determined to out-law these dormant titles, and thereby protect the treasury and increase the State's revenues. Nor can there be doubt that the legislative purposes was to proceed carefully and in that manner that would satisfy the requirements of the Constitutions of this State and of the United States. The legislature did not intend to deal tenderly with a situation that had been aggravating in its merits; it realized that sometimes sternness is justice, and further leniency injustice. The legislature has squarely faced the problems of the situation. The court has no disposition to look at it otherwise than it is—to

pass upon the questions of law presented, grim and bare as they may be.

Proceeding under article 3, of the Act of 1906, appellant, claiming to be an owner of certain patents issued upon Virginia warrants prior to 1789, petitioned the county courts of Pike, Floyd, Knott and Letcher, to list for taxation against it 275,235 acres of land in Pike county, 88,215 acres in Floyd, 55,020 acres in Letcher, and 29,058 acres in Knott, aggregating 447,525 acres. The county courts refused to list the lands upon the ground that the petitions were not sufficient under the statute. This feature will be noticed particularly further along. On appeal to the circuit courts of those counties, the same conclusion was reached, and the appellant's applications were refused, whereupon these appeals are prosecuted to this court.

The first question presented is has the court jurisdiction of the appeals?

The appellate jurisdiction of this court is regulated by statute. Only such matters as the legislature may see fit to allow to be brought here on appeal, are recognizable by the court. No person has an inherent right of appeal, however natural the notion that appellate courts should be open always, as are all other courts, to a litigant who conceives that his rights have been denied. But jurisdiction, and final jurisdiction must be lodged somewhere. It has been left to the legislature to do that. It is exceptional indeed when appeals are allowed in the matter of tax assessments. The reasons are obvious. But they are sometimes allowed by legislation.

The language of the statute in question must be looked to, to see whether an appeal to this court is denied, in spite of the provision of the general statutes, fixing this court's appellate jurisdiction.

A clause of a section of this article provides that the county court "upon finding the amount," "shall cause a record of the findings to be made on the order book of the court and certified to the Auditor. Should

the court find that the land has been assessed * * * as of any of said dates * * * it shall accept the assessment as a basis upon which to ascertain the amount," etc. "The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the Auditor of the State, and to the clerk of the county court." (Sec. 2, article 3, p. 118, Acts 1906.)

Under Sec. 4241, Ky. Stats., relating to proceedings by Auditor's agents to have omitted property assessed, a similar provision occurs, though not in the same language. There the finding of the lower tribunals as to the value of the property assessed it not subject to appeal, but an appeal is allowed upon the question of the liability of the property to assessment.

Appeals are allowed to this court from final judgments in all cases in circuit courts where the title to land is involved, or where the amount in controversy exclusive of interest and costs, is not less than $200. "In all other civil cases, the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts." (Sec. 950, Ky. Stats.) We construe the word "finding" in the act before us as relating to the fixing of the value of the property assessed. To that extent only is the appellate jurisdiction of this court as fixed by Sec. 950, Ky. Stats., supra, curtailed. We are of opinion that this court has jurisdiction of the appeals.

The constitutionality of the act is questioned by appellant. The question must be decided, as if it is unconstitutional, appellant would have had the right to list its lands under other provisions of law relating to the assessment of omitted property. If it is constitutional, then unless appellant has compiled with its terms, the action of the lower court was right.

We will take up the different grounds upon which the act is assailed.

First. It is said to be void "because it takes from the assessor, a constitutional officer, the power conferred upon him alone by the Constitution and the laws pursuant thereto to assess all real estate."

Section 227 of the Constitution creates the office of assessor, but does not define his duties.

Section 172 of the Constitution requires all property not exempt from taxation to be assessed at its fair cash value, and provides for punishing "any officer or other person authorized to assess values for taxation," who shall willfully commit any error in the performance of his duties. This seems to imply that the legislature may provide other persons to assess property. It has always been done that way under the present and preceding Constitutions. Railroads, and other public corporations, distillers, and dealers in rectified spirits are, and for a long time bank and trust companies were, assessed by "other persons" than the county assessor. The latter can not assess for any period than the current year. All omitted assessments are done by the county court, and have been for many years, certainly ever since the adoption of the present Constitution. This question was raised in Commonwealth v. Taylor, 101 Ky. 325; 19 Ky. Law Rep., 552, and there decided adversely to this appellant's contention.

Second. It is claimed that the act is local and special and thereby violates Section 59 of the Constitution. The only point urged in brief of counsel under this head is that "the act could not apply at the very outside to more than twenty or thirty-five counties in Kentucky." But that does not constitute the legislation either local or special. A statute regulating the care and use of natural gas wells might not apply in fact to more than a dozen counties in the State. Nevertheless the terms of the statute are general, and are applicable to every portion of the State where the conditions may exist, or may arise in the future. The classification of the subject, lands which have been omitted from assessment for a great many years, is a legitimate exercise of legislative discretion. It finds many counterparts in the statute respecting other classes of property, such for example, as special provisions regarding the listing of non-residents' lands; the assessment of dealers in tobacco and

liquors. The act is as general as the nature of its subject will admit. That it may not apply to every county, would be because the general condition treated of did not happen to exist in that county. Nevertheless, the act is not thereby made local. Nor is its subject special legislation in any legal sense.

Third. It is claimed that the act violates Section 171 of the Constitution, which requires that taxes shall be levied for public purposes only. The grounds of this objection are, (1.) That the provision for investing the occupying claimant with the forfeited title, shows that he is the intended recipient of the tax; and (2.) That the provisions for the sale of the other forfeited lands, and the payment of some part of the proceeds to the officers who represent the State in the prosecutions, is also a provision for their private purposes. Counsel confuse the tax levied upon the lands, and the disposition of the lands by the State after they shall have become forfeited. There is no pretense, and there can be no ground for any, that the act provides any other use of the taxes that may be derived from assessments under the act than is made of all other taxes imposed on all other property of the State and its counties. But if the assessments are not made because of the contumacy of the property holder or claimant, and thereby a forfeiture of his title results, then it is not material to him what becomes of the title which has been vested in the State. There is nothing in the Constitution which prohibits the State's conferring the title upon whom it pleases, and of disposing of it in any manner its legislature may elect to do. The forfeiture is not a tax. Nor is it the equivalent. It is a penalty imposed for a violation of a statute. Like other penalties, it is the subject of legislative control and disposal without regard to the previous title or ownership of the convicted violator of the law.

Fourth. It is contended that the act violates Section 51 of the Constitution, which requires that every legis-

lative act shall relate to but one subject, which shall be expressed in its title.

The title to the act is "An Act Relating to Revenue and Taxation."

If this article is bad for the reason last assigned, then much, if not most, of the existing revenue law of the State must fall for the same reason. A great many analogous instances might be cited from that act. But we will confine ourselves to a few. Railroads and other public service corporations are required to report certain information upon which their assessments are to be based by the State Board of Valuation and Assessment. Their failure is penalized by fine of from $50 to $1,000.00 and a suspension of the corporate franchise. Similar penalties were upheld, and a like act declared constitutional, in Louisville & Jeffersonville Ferry Co. v. Commonwealth, 104 Ky., 726. Distillers are required to furnish certain detailed reports, under a penalty for failure of from $100 to $500 a day. (Section 1, subdivision 4, article 12, Acts 1906.)

Liquor dealers are licensed, with elaborate procedure, for obtaining license, and for their revocation.

In a similar statute, a provision for licensing peddlers, required that all notes taken by them should be endorsed "Peddler's Note," or be void. The law was upheld as constitutional, although the question of the sufficiency of the title does not seem to have been raised. (Hays v. Commonwealth, 107 Ky. 655.)

This same act provides for a State Board of Equalization, their appointment, duties and compensation; for a county board of supervisors, their appointment, duties and compensation, and likewise for the appointment of auditor's agents. All these matters are germane to the title "Revenue and Taxation," which is the subject of the act.

The last Constitution contained a similar provision to Section 51, of the present Constitution. Under it, and indeed since the foundation of the Commonwealth, legislation has been enacted under precisely the same

or equivalent title, in which equally as wide range of treatment has been indulged as in this act. In Phillips v. Cin. & Cov. Bridge Co., 2 Met., 219, this court commenting on that constitutional provision says:

"It should not be so construed as to restrict legislation to such an extent as to render different acts necessary where the whole subject matter is connected, and may be properly embraced in the same act." And further: "None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and not foreign to the subject expressed in its title.

L. & O. Turnpike Co. v. Ballard, 2 Met. 165, it was said: "A more liberal construction of this clause of the Constitution will be not only more consistent with the objects intended to be accomplished by it, but will be found necessary in the practical business of legislation." (Hoke v. Commonwealth, 79 Ky., 567; Chiles v. Drake, 2 Met., 140; Jacobs v. Louisville & Nashville R. R. Co., 10 Bush, 263; Conley v. Commonwealth, 98 Ky., 125; Weber v. Commonwealth, 24 Ky. Law Rep., 1726; Hyser v. Commonwealth, 116 Ky. 415; Sutherland's Statutory Construction, Section 93; Cooley's Constitutional Limitations, Section 145.)

Not only is every feature of article 3, above, logically connected, but the whole naturally pertains primarily to the subject of revenue and taxation. Besides, the subject has from the beginning, in this State, and prior and since in Virginia, has been treated as embracing the identical features now brought forward, so that if any one concerned in such legislation, whether a member of the assembly, or a land owner looking out for his interests, would naturally have expected to find such legislation under that title, and reasonably all that was germane to the subject treated under the one head.

One complaint is, that the measure is really not one of revenue, but of police; and that, therefore, it is not germane to the title. There will be found in this general

act many features which partake of police regulation, as well as of revenue. This is particularly true of the most of the article devoted to license, such as liquor licenses, peddlers, pawnbrokers, billiard tables, pool rooms, exhibitions or circuses, and the like. Such measures might, without any impropriety, have been classed under either head, as they truly pertain to each as they are treated of. On this subject Judge Cooley (Cooley on Taxation, 2 Ed. Section 587), says: "It has been seen that other considerations than those which regard the production of a revenue are admissible, and that regulation may be kept in view when revenue is the main and primary purpose. The right of any sovereignty to look beyond the immediate purpose to the general effect, neither is nor can be disputed; the government has the general authority to raise revenue, and to choose the methods of doing so; it has also general authority over the regulation of relative rights; privileges and duties, and there is no rule of reason or policy in government which can require the legislature, when making laws with one object in view, to exclude carefully from its attention the other."

The primary purpose of article 3, is to raise revenue. Its incidental purpose is to regulate other rights. Also incident, is the disposal of that which, in default of the revenue sought, shall come to the State by way of penalties. As they will in such event belong to the State, to dispose of them in that way that will most redound to the public welfare as the legislature shall judge, is a logical continuation of the same general subject of legislation. That the legislature has the power to so dispose of what may be forfeited to it, we have no manner of doubt, nor has there been cited to us any case, or advanced any reason, to the contrary.

Fifth. The act is claimed to be void, as violative of the compact with Virginia.

The compact, so far as here involved, and already been set out in the foregoing part of this opinion. As may be naturally expected, that instrument has been

before this court a number of times, as well as before the Supreme Court of the United States, for construction. It is conceded to be as obligatory upon this State to its fair intent as fully as if engrafted in the Constitution of the State. Nay, more so, in that while the State might alter or abrogate provisions of its own Constitution, it is without power to either alter or ignore the compact. (Green v. Biddle, 8 Wheat., 1; Lessee of Joseph Marblet v. Silk, 11 Pet., 1; Poindexter v. Greenhow, 114 U. S., 271.)

Among the first authorative attempts on the part of this court to construe the compact was in Boone v. Helm, 4 Dana, 403, although it had been discussed indicating the views of certain of the judges in Hays' Heirs v. McMurry, 1 Litt., 365; and in Beard v. Smith, 6 Mon., 430. In Boone v. Helm, this court, speaking through Chief Justice Robertson, respecting the clauses of the compact now in question, said:

"All these expressions, taken together, mean, even according to their literal import, this and only this; that, as to the validity and effect of such claims to land as then existed under the Virginia land system for the district of Kentucky, the rights of the claimants, as then existing, whether perfect or inchoate, should be tested by the laws under which they had been acquired, and that Kentucky should not abolish those laws, or enact and enforce any statute destructive of the validity of such of those claims as were, according to the laws existing when they were acquired, valid and available. Then if any such claimant had a good entry, it—that is, the entry—should ever remain good, as a valid and legal location. If he had a survey, good according to the law under which it was made, it—that is the survey—should continue to be held as having been, when made, legal and valid. If he had obtained a patent, it—that is, the patent—should be deemed, in the courts of Kentucky, to have vested in the patentee all the rights which were guaranteed by the laws of Virginia existing when it was issued. And if, at the time of the separation, one claim-

ant had a perfect, and another an imperfect title, to the same land, each, according to its degree, valid and legal, both shall ever be held, in the like manner, to have been then good, and neither of them shall ever be invalidated by Kentucky. This seems to us to be the utmost latitude of the literal and intrinsic meaning of the compact. And it does not interdict prospective legislation by Kentucky, for perfecting any imperfect title which was good, in its degree, at the date of the compact, or of the separation, or for maintaining her own just authority as a sovereign, in procuring revenue, giving proper repose to honest occupants, preventing vexatious litigation, or in enacting and upholding, prospectively, any other just system of public economy, which Virginia herself might have adopted without rendering, by retroaction, that invalid which was valid under her laws. It is admitted in argument, and could not be plausibly denied, that prospective limitation and revenue laws, by Kentucky, affecting rights to land acquired from Virginia, are not interdicted by the compact."

In Kendall v. Slaughter, 1 A. K. Mar., 378, involving the power of its State to change its limitation laws so as to give a shorter time than Virginia did at the separation for bringing actions, this court said:

"But whilst the legislative enactments of this country, are by the compact, not permitted to affect the validity of those rights, we are of opinion that instrument should not be construed so as to preclude the legislature from either regulating the mode of action, or limiting the time, it should be prosecuted, for the purpose of asserting those rights.

"That the section alluded to, was not understood by the parties to that compact, as inhibiting the legislature from passing laws by which those rights might become forfeited, is, we apprehend, apparent from other parts of that instrument. For it is furthermore, in the latter clause of the eighth section provided, that no neglect of cultivation or improvement of any land, within either the proposed State or that of Virginia, belonging to the

non-resident citizens of the other, shall subject such non-resident to forfeiture or other penalty, within the term of six years," etc. * * * "If, then, notwithstanding the compact, laws of forfeiture may be enacted, no reason is perceived why the legislature should not be allowed to regulate the limitation of actions. For although possession may, in process of time, ripen into a perfect right to the land, it does so under the efficacy of the laws of limitation, operating in the nature of a forfeiture upon the failure of the claimants in not asserting the right in due time."

These views are fully sustained by the Supreme Court of the United States in Hawkins v. Barney, 5 Pet., 457. This action also involved the validity of a seven-year statute of limitation passed by Kentucky, and applied to a claimant under a Virginia grant, whereas the period of limitation in Virginia, applicable to such actions at the time of the separation, was twenty years. That court, commenting upon the compact, said:

"It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. * * * Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign; of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State.

"If the seventh article of the compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and, in fact every law applicable to real estate. * * *

"The last member of the eighth article of this compact distinctly recognizes the existence of the power in Kentucky to pass similar laws; notwithstanding the re-

striction of the seventh article, and also the probability of her resorting to the policy of such laws."

No one seems to have thought before that the power of the sovereign State of Kentucky was, or was intended to be, curtailed by the compact with Virginia respecting the right of the former to proceed in her own way to coerce taxes from all property within her dominion for her support. The right to levy and collect taxes from the citizens, or property within its jurisdiction, is inherent in a State; as a part of its coercive process; it may forfeit the title of recusant taxpayers, or distrain their property without judge or jury. The compact no more prevents the State from forfeiting the title of property whose owners refuse to list it and pay taxes upon it, than it denies to this State the power to levy the taxes. Nor does the compact affect at all the question of procedure, jurisdiction of courts, the subsequent devolution of the title, requirements as to registry of subsequent conveyances, or the future duties and obligations to the State of the owners of such titles.

The cases examined comment upon the fact, and lay stress upon the point, that whatever Virginia herself could have done in subsequent legislation, as affecting the titles in question, Kentucky might also do. As we have seen, Virginia, at the time of the separation, had provided a forfeiture of titles for a failure to pay the tax for three years and has continuously since enacted such legislation. It was not a violation of the compact for Kentucky to enact the statute in question. It does not in the least impair or affect the validity of the patents issued by Virginia or under Virginia surveys, nor does it alter the right of any holder of such patents that was acquired under the laws of Virginia. They took the patents subject to the right and power of the sovereign to compel the payment of taxes on the land in the future, and subject to the correlative power in the sovereign to forfeit the titles to the State as a penalty for the non-payment of the taxes.

Sixth. It is contended by appellant that the act in question is vicious because it seeks to extort an unlawful duplicate tax upon the same land. In the petitions of appellant is this paragraph:

"Your petitioner is advised by counsel learned in the law and believes that in all of said years and now, under the laws of the Commonwealth of Kentucky, whenever the occupant or occupants of any part or parts of any of said tracts have paid the taxes thereon, which those under whom your petitioner claims ought to have paid or ought to pay, the person so paying the tax shall be entitled to recover of the owner the amount of the tax so paid and interest, which shall continue a lien on the property upon which such tax was paid."

The laws of the Commonwealth referred to in the foregoing statement of the petitions are as follows:

"Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon, and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lienholder.

"Where ever the occupant or tenant of any land, or bailee or person in possession of any personal property, shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid, and interest, which shall constitute a lien on the property upon which such tax was paid. (Ky. Stats., Secs. 4032, 4033, continued in force by Act of March 15, 1906, article 11, Secs. 14 and 15; Acts 1906, page 92.)

There is no such connection or privity between adverse claimants of land as entitles one to recover taxes voluntarily paid by him on the land, although he in fact did not own it, from another who did own it but failed to list it and pay the taxes.

That which the State taxes is the property of the claimant—not the land. The right to possess, the title or legal right of dominion, is the property which the law protects, and is that property which it taxes. If two persons claim the same land, each having a title, but undetermined which is superior, shall the State stand back until their dispute is settled before it can exact a tax from the owners? For if one of them can lawfully refuse to list his claim, which is his estate in the land, then the other could also. The State creates property, that is, the right to a thing, by protecting its use and enjoyment; it maintains police to protect its security and that of its owner; courts in which his rights may be vindicated, and the whole fabric of social government which gives all value to every kind of property. In return, the State exacts certain personal services from the citizen, and in addition a sum at certain intervals, called a tax, with which to defray the expenses of the government which he enjoys and which protects him in his rights of property. The State, then, may tax whatever is property within its jurisdiction. If one has an imperfect title to land, that is property, and it may be taxed, although another have a more perfect claim to the same land which is also taxed as his property. That is not double taxation. There are many instances in which the same tangible thing supports several separate properties. For example, a corporate franchise is taxed, so is the property which is used in connection with it, and without which the franchise would have no appreciable value. Lands owned by corporations may be taxed, that is, the corporation's dominion and right in them. Based upon the land, the corporation issued shares to its stockholders; these shares, mere intangible things, may also be taxed against the shareholders. Nor would that be double taxation, though it might be impolitic. A debt is taxable as the property of the creditor; that for which the debt was created if property is also taxed as the property of the debtor. The Act of 1906 provides: "It shall be the duty of each and every owner or claimant

of land to pay all the taxes * * * and to list said land * * * for taxation."

It also provides: "The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant, shall not relieve against the duty therein imposed."

The provision existed under the General Statutes. (General Statutes, page 1036.)

Double taxation is not per se unconstitutional. It is only when taxes are imposed twice by the same government, upon the same property as against the same owner that they are inhibited, and then only by virtue of the clause in the Constitution which requires all taxation to be uniform. It is only when there is a destruction of uniformity by virtue of the so-called double taxation that it is prohibited. The State is interested not only in having its taxes paid to it, but in having them paid by the persons who ought to pay them. The fact that the State makes a claimant in possession—though not having the best title—pay taxes upon his property, that is, his claim, does not exhaust the State's power to compel any other claimant of a title to the same land to list his claim and pay the taxes upon it. The statute quoted above, and relied on by appellant, at the utmost, would not give a claimant of land who paid taxes on it, a lien as against the true owner, if the latter also paid. When the legislature requires the true owner to list and pay taxes on his claim, it is, therefore, no defense under this statute that another (a stranger to the title) has listed them and paid the taxes, and would have a right of action to recover for them if the State did not collect them from the true owner. (Simpson v. Edmiston, 23 W. Va., 675.)

Seventh. The act is claimed to infringe both the Federal and State Constitutions in that it attempts, so it is argued for appellant, to deprive citizens of their property without due process of law. This proposition involves the power of the State to forfeit lands of the

owner or claimant because he failed to list or pay taxes on them.

The power of the State to levy the tax is not to be questioned. No more is its power to coerce its payment. As listing the property for assessment is a necessary step towards collecting the tax, the State must have as ample power to compel that step as any other in the process of collecting the tax, or its whole power in the premises is reduced to the strength of the weakest incident. It is no longer controverted that the State may distrain the delinquent's property, may sell it the most summary proceeding. No judicial action is necessary to perfect the title. "In what important particular does this differ from the case of forfeitures," says Judge Cooley in his work on Taxation, page 464, "except that to the proceedings which are to work the forfeiture there is added the one requirement of a public sale? But there are in the sale no elements of an adjudication; it does not stand in the place of one; its purpose is only to bring to the public treasury the tax for which the sale is made. Incidentally in the proceedings a purpose is kept in view not to sacrifice any further than shall be necessary the interests of the owner; and to this end notice of the sale is required, with a view to invite competition among bidders. But we are not aware of any Constitutional principle that entitles a party to have his duty coerced by a public sale of property rather than by a forfeiture of it. A sale by a ministerinal officer which, as the closing step in administrative action, is to divest the owner of his title, is as much obnoxious to the charge that it deprives him of his freehold without a hearing, as is the legislative forfeiture."

That text was written before the opinion of the Supreme Court in King v. Mullins, supra, in which, in summing up on the West Virginia Constitution and Statutes already noticed, the court said: "We hold that the system established by West Virginia, under which lands liable to taxation are forfeited to the State by reason of the owner not having them placed or caused to be

placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which on petition required to be filed by the representative of the State in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States or the Constitution of the State."

This court in Marshall v. McDaniel, 12 Bush, at page 383, said that it was within the power of the State to provide for a forfeiture of the owner's title if he should fail to list or pay taxes on his land, but it was held in that case that before the forfeiture could become effective he must have an opportunity to be heard in the matter before some competent tribunal to try the question—not whether it was right that his title should be forfeited, but whether the facts existed which, under the statute, worked a forfeiture.

So in Harris v. Wood, 6 T. B. Mon., 643, this court held that the State was not required, in collecting its taxes, to submit the question of right, or of the taxpayer's liability to a judicial tribunal or to a jury; that such had never been the law of the land.

Under the act here involved, the owner is given a day in court. His title does not become forfeited till it is so adjudged in an action in the circuit court, to which he is made a party, and is summoned if within the court's jurisdiction, or proceeded against regularly by publication otherwise, and a regular trial is or may be had. The inquiry would be in the trial, did he fail to list or pay the taxes within the time, and in the manner, prescribed by the statute? If he did fail, then the judgment will carry into effect the legislative fiat that his title shall be forfeited to the State; if he did not fail, then

the proceeding to forfeit will be dismissed and he will be left his title as it was before.

In this connection we will notice another objection made against the statute, which is that it is an ex post facto law; that it punishes an act, or omission, by forfeiture of property, which, when the act was omitted, was not so punishable by law. But such is not the fact. It is not the failure to list in the years 1901, 1902, 1903, 1904 and 1905, that works the forfeiture; but it is the failure after the passage of the Act in 1906 to thereafter list the property for the five years named, and before January 1, 1907. It was within the power of the legislature to forfeit for even one year's omission.

Eighth. It is assumed in argument against the validity of the act that any retrospective statute is unconstitutional. But such is not the law. The legislature may provide for retrospective assessment of property, and if it has been omitted, ought to do so (Levy v. City of Louisville, 97 Ky., 394), as otherwise such property would enjoy an exemption to which it was not entitled, and thereby impose an additional and unjust burden upon other taxpayers. There is nothing in our Constitution which prohibits retrospective taxation. Nor is there in the Federal Constitution. (Florida Central R. R. Co. v. Reynolds, 183 U. S., 471.) The only inquiry is, has the legislature clearly indicated its purpose to tax the property retrospectively? (Durrett v. Davidson, 29 Ky. Law Rep., 401.) Under the language of this act there can be no doubt of such purposes.

Ninth. There are a number of other objections made to the statute by appellant, all of which may be grouped under the general complaint that it is harsh, oppressive and unjust. Were these objections well grounded, they would afford no basis for relief at the hands of the court. The policy of the legislature may be looked into by the courts for the purpose only of interpreting statutes. If then they are found to be within the power of the legislature to enact, the business of the court is ended. That the legislature saw proper to enact a harsher remedy

than it might have done; that it allowed the minimum of grace to the taxpayer; that it imposed most onerous penalties for his defaults; that it imposed even greater penalties than it does as against other classes whose fault may be no greater; that it does not even excuse infants, or married women, or persons laboring under disability, when the general policy of legislation is to deal more indulgently with those classes; are all considerations of expediency which appeal to the good sense and the conscience of the legislators. It is not tolerable in our form of government, with its distinct separation of powers, that acts of the legislative branch should stand or fall according as they appealed to the approval of the judiciary; else one branch of government, and that the most representative of the people, would be destroyed, or at least completely subverted to the judges. We do not say that this act is to be regarded in the light of the history of its enactment and the abuses it was intended to remedy, as falling within the category described. There is abundant basis for the act in which it will appear not only as reasonable, but as highly politic. All that we do mean to say is, that any tested by precedent and principle, we are unable to find that it violates any provision of the Constitution of the United States or of this State, or in any wise transcends the power of the legislative department of the State government.

Finally, did appellant comply with the statute, so that the county court ought to have listed the lands?

The petitions in these cases contained the same averment, of which the Pike County case is selected as a sample, as follows: "Your petitioner claims to be an owner of the herein below described tracts of land, situated in the county of Pike, State of Kentucky, but not of the improvements thereon, nor of the surface of certain parts of each tract as hereinafter stated, to wit."

Then follows a description of land by calls and distances, which it may be assumed were sufficiently explicit to have located the several boundaries. The petition sets out the dates of issue and serial numbers of the patents,

and the instruments through which the petitioner derived title, namely, unrecorded deeds from Charles B. Hillhouse, and that the title of Hillhouse was derived by deeds and contracts to convey, made by him with others "claiming by inheritance, by divers mesne conveyances, from those to whom said tracts of land respectively were granted by letters patent."

The petition then stated that the lands had not been assessed for any of the years 1901 to 1905, both inclusive, either by the petitioner or by any one under whom it derived title, and that no part of the taxes for any of those years had been paid. But the petitions alleged that parts of each of said tracts had been listed for taxation for each of said years by others than the plaintiff, and those under whom it claimed, and that taxes under this listing have been paid by strangers. The petition then continues: "Your petitioner does not claim to be the owner of any improvements on any of said tracts of land, nor of so much of the surface of said lands as has been adversely held by others for a period sufficient to toll your petitioner's right of entry."

The defects of these petitions are, first, they do not disclose the names of the owners, and, therefore, do not show the proper persons to be assessed; they show that appellant is only "an owner;" of what part, or in what proportions and by whom the remaining portions are owned is not shown; second, they do not "so describe the land proposed to be assessed" as that, in the language of the statute, "it can be identified;" the land to be assessed in not only specific tracts, so described in their entirety as to be susceptible of accurate location, but the interest of the listing owner, if he owns less than the entire tract must be so described as that it may be identified; third, some of the patent boundaries described lie only partly in the county wherein it is proposed to list it. The petitions show that fact, but do not show where, in what part of the county, the parts to be assessed do lie; nor do they show where the excluded parts which it is admitted do not belong to the petitioner lie,

so as that the court could with reasonable certainty and intelligence, fix a valuation upon that part which is assessed. For lands which lay upon the main Big Sandy river, in Pike County, would have a much greater cash value than if they lay across a mountain range miles away from a navigable river or a railroad. If the claimant does not own the whole tract described, he must show what portion he does own or claim. A failure to do so describe exclusions as that they may be identified leaves the description as indefinite as if the original tract could not be identified.

Nor are these objections merely technical, interposed whimsically so as to defeat the proposed listing of the land, and so as to work its forfeiture. They are each substantial, and have solid merits to support them. Only the title of the person assessed passes by a tax sale. (Johnson v. McIntyre, 1 Bibb., 295.) If lands are assessed in the name of the wrong persons, no title passes by the tax sale. (Wheeler v. Brammel, 10 Ky. Rep., 301; Spalding v. Thompson, 16 Ky. Law Rep., 836.) The listing of partnership property in the name of an individual member of the firm, is invalid to pass the partnership property under tax sale. (Ferguson v. Clark, 21 Ky. Law Rep., 697.) A tax deed for one hundred acres of six hundred acres was held void in Humphries v. Huffman, 33 Ohio St., 395. The description in the deed must be one that identifies the land with reasonable certainty. (Cooley on Taxation, 516; Gooch v. Benge, 90 Ky., 393.) In the last named case, it was held that the description in the sheriff's deed must be so accurate as to "enable the officer selling it and those disposed to purchase to find it and ascertain the character of it by the description given." The description in the deed and the assessment roll must agree, or the title fails to pass. (Carlyle v. Cassady, 20 Ky. Law Rep., 562.) A sale for taxes that have been paid, is void. Therefore, it is of the first consequence that the assessment should be such as that if the lands were sold under it, the title of the taxpayer would pass. Otherwise, no one would be justified in bid-

ding at the sale, and the State would get none of its taxes in spite of its efforts. Furthermore, if the taxpayer did not pay within the time fixed in the statute, and the State or county elected to forfeit his title, if the assessment was ineffectual the proceeding to forfeit must fall by the way. As the non-resident may not be reached otherwise for the tax than by the proceeding in rem., it is competent and necessary for the State to have in the first instance such an adequate list as will satisfy every requirement of the law as to passing a valid title if a sale or forfeiture of the land should be necessary to realize the tax. (Commonwealth v. Tobacco Co., 107 Ky., 1.) The purpose of the legislature was to enforce, under the extreme penalty of forfeiture for failure, such a listing of the property as would in the future prevent its escape from taxation, as it had been enabled to do in the past because of statutes so loosely drawn as that no title would pass in case of default. And as the owner was a non-resident, or might be, a penalty of a fine would be wholly inadequate to secure the listing, as owing to his absence from the State jurisdiction could not be obtained to assess the fine in a criminal or penal action.

An assessment under the offer made by appellant would not have enabled the State to sell any particular piece of land, or any particular interest in any particular parcel, so as to pass the title of appellant and the others claiming with it. The petition was so vague and indefinite as to utterly fail to meet the requirements of the statute.

It does not answer to say that the taxpayer did not know his property or its description. He is required to know it, and to furnish it so as the property may be certainly identified from it; nor is it an answer to say that it would be too expensive for him to make the necessary investigation. Wherefore, we conclude that the county courts were right in refusing the lists, and the circuit courts' judgments so holding are each affirmed.

The whole court sitting.

DISSENTING OPINION BY JUDGE HOBSON.

When an act is not punishable under the law in existence when it is done, it can not be made punishable by the Legislature by a law subsequently passed; and, upon like principles, where an act is punishable in a certain way when it is done, the Legislature can not by a subsequent law add to the punishment or penalty. The Legislature can not deny to any one the equal protection of the laws; and in my judgment article 3 of the revenue act of 1906 (Acts 1906, p. 88, c. 22) is void, both on the ground that it is ex post facto legislation, and that it denies to the holders of land titles referred to, the equal protection of the laws.

The act was approved March 15, 1906. It took effect about 90 days thereafter. The first section of the act makes the duty of every owner or claimant of land to pay all the taxes which has been assessed or should have been assessed against him, or those under whom he claims, as of the 15th day of September, 1901, 1902, 1903, 1904, and 1905; and, if it had not been assessed for any of these years, the act made it his duty to assess the land and pay the taxes, interest, and penalty therein provided for. His failure to do this is made a cause for the forfeiture of his title; but this forfeiture shall be extinguished if on or before March 1, 1907, he lists the land and pays the taxes, with the interest and penalties provided by law in case of the redemption of land sold for the nonpayment of taxes. When land is sold for the nonpayment of taxes, a penalty of 15 per cent is added, and the taxes bear interest at the rate of 10 per cent. So that the meaning of the act is that the owner of land who had failed to list it for the years named must list it after the act takes effect and pay a penalty of 15 per cent and also interest on the taxes at 10 per cent per annum from the time he was delinquent; that is, from the time the land should have been assessed. By the law in force up to the time this act took effect the

owner of land which had been omitted from assessment might voluntarily have it assessed at any time and pay taxes, without interest or penalties. If he failed to list it voluntarily, and a proceeding was instituted against him under Sec. 4241 of the Ky. Stats., of 1903, he was liable to a penalty of 20 per cent which went to the officer instituting the proceeding; but, even in this case, he was not liable for interest at 10 per cent. on the taxes, and if he made the assessment voluntarily, without a proceeding being instituted against him, he was not liable for the penalty of 20 per cent. While the act gives him until March 1, 1907, to list his property and pay the taxes, from the moment the act took effect the only way that he could escape the forfeiture of his title was to pay not only the taxes, but the interest and penalty. The act does not give him a certain length of time to list his property, and provide that if he fails to list within that time he shall be subject to the penalty; but it imposed the penalty upon all who are delinquent in listing their land and who would escape the forfeiture of their title by listing it after the act takes effect.

It is said that so much of the act as imposes the penalty for the past delinquency may be rejected, and that the balance of the act may stand; but this is not a case in which that rule can be applied, for the reason that the act forfeits the title of all persons who had failed to list their land for the years named, and the only way in which they can escape the forfeiture is by paying the taxes, with interest and penalty. If they do not pay the taxes, interest and penalty, the forfeiture stands. If that part of the act which provides for the extinguishment of the forfeiture is invalid, then there is no way in which the owner can escape the forfeiture. Besides, this is an essential part of the whole scheme of the act, and it can not be presumed that the Legislature would have passed the act without this. The forfeiture of the titles of the owners is the purpose of the act. There would not be a clearer case of legislative intention to punish retrospectively. By the general law the person owning land

at the time it should be assessed is not only liable for the taxes, but remains bound therefor; by this article the present owner's land is forfeited to the Commonwealth for the nonpayemnt of taxes by the former owner. By the general law, if the occupant of land pay the taxes thereon, he is entitled to recover of the owner the amount so paid, with interest, and has a lien on the land therefor; by this article the fact that the land has been listed for taxation and the taxes paid by the occupant does not prevent the forfeiture as therein set out. By the general law land may be assessed retrospectively at any time not later than five years, but not to prejudice the rights of purchasers acquired in the meantime; by this article the purchaser is required to pay the taxes, with interest and penalty. By the general law, if the owner sells the land after the 1st of February of the year in which the taxes are due and payable, it is the duty of the owner to pay the taxes; by this article the purchaser's title is forfeited if he does not pay them. By the general law, where property has been sold for taxes, the owner may redeem it within two years; by this article the owner forfeits his title to the land if he fails to assess it and pay the taxes thereon as therein provided. By the general law, if the owner fails to assess his property, it may be assessed retrospectively, but the taxes are then collected as other taxes; by this article the taxes are not collected as other taxes, but must be paid at once, with interest and penalties, to avoid a forfeiture of the title. By Section 4 of this article, before the defendant may redeem, he must pay, not only the amount of unpaid taxes charged, but those that ought to have been charged against those under whom he claims for 50 years preceding the filing of the counterclaim. No such provision is found in the general law relating to other property, and there is no provision in the general law for double taxation of the same property, and the payment of the taxes by each claimant where there are two claimants to it.

A reading of the article shows that it was a deliberate attempt on the part of the Legislature to deny the equal protection of the laws to the owners of the land titles referred to, and to provide as to the holders of these land titles an entirely different system from that provided for the holders of other species of property. It is therefore, in my judgment, void both under the Constitution of this State and the Constitution of the United States.

For these reasons, I dissent from the opinion of the court.

EASTERN KENTUCKY COAL LANDS CORPORATION

vs.

COMMONWEALTH OF KENTUCKY.

Opinion by Judge Lassing.

These appeals were sued out upon the same record, involve the same questions, and were argued and will be considered together. Under the provisions of article 3 of the act of the Legislature entitled "Revenue and Taxation," approved March 15, 1906 (Laws 1906, p. 115, c. 22) the Commonwealth of Kentucky filed its petition in equity in the Pike County Circuit Court against the appellants, the Eastern Kentucky Coal Lands Corporation, J. C. Twyman, and others, seeking to forfeit the title of appellants to the lands described in the petition upon the alleged grounds that they had not complied with the provisions of the article with respect to the listing of the same and payment of taxes thereon as of September 15, 1901, September 15, 1902, September 15, 1903, September 1, 1904, and September 1, 1905. Appellants Eastern Kentucky Coal Lands Corporation and J. C Twyman were served with process. Appellants G. B. Gill and others were made defendants as unknown defendants, owners, and claimants, as authorized by the article, and were constructively served with process by warning order, as required by the Code, against nonresident aid absent defendants, and also by publication, as required by the act.

The petition described the land, the title to which was sought to be forfeited, by giving the patents, their dates, where recorded, and number of acres contained in each. It also described the land by metes and bounds and courses and distances, and there were filed with it copies of each of the patents, containing in the aggregate over 300,000 acres. It was further alleged that the defendants

Eastern Kentucky Coal Lands Corporation, J. C. Twyman, and the unknown and absent defendants were the owners or claimants of the land under the patents named, and that neither the original patentees nor any person in privity with them, nor the Eastern Kentucky Coal Lands Corporation, J. C. Twyman, or the other named, but not appealing defendants, nor the unknown defendants had ever listed the land, or any part of it, for taxation, or paid any taxes thereon, alleging specifically that they had so failed to list or pay taxes thereon levyable and assessable as of the dates above named. Appellants Eastern Kentucky Coal Lands Coroporation and J. C .Twyman filed general demurrers to the petition. After these had been overruled they filed separate answers; the former setting up claim to all of the land described in the petition, and the latter claiming in connection with the other heirs of one Reuben Twyman, one of the three patentees named in one of the patents, to be the owner of the land described in that patent, containing about 7,500 acres. The answer of the corporation, in addition to traversing some of the allegations of the petition, pleaded affirmatively that in compliance with the provisions of article 3 it had filed its petition in the county court of Pike county before January 1, 1907, seeking to have the land claimed by it assessed as of said dates, and filed therewith copies of the proceedings in that action in the county court, and upon appeal in the circuit court. By this record it was shown that the corporation appellant in December, 1907, had filed its petition in the Pike county court, claiming to comply with the provisions of the act, and at the same time attacking its constitutionality that the county court, denying the sufficiency of the petition, but sustaining the validity of the act, dismissed the petition; and that a similar judgment had been entered in the circuit court upon appeal to it. The answer of J. C. Twyman was similar in all material respects, but he prosecuted no appeal to the circuit court from the judgment of the county court. While the action of the Commonwealth

v. Eastern Kentucky Coal Lands Corporation, J. C. Twyman, and others, seeking to forfeit their title, was pending, and before trial and judgment, this court, in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth of Kentucky, 106 S. W. 260, 32 Ky. Law Rep. 129, affirmed the judgment of the Pike circuit court in dismissing the petition of said corporation to list, upon the ground that it did not comply with the mandatory provisions of the act, and sustaining the constitutionality of article 3, upon which this forfeiture proceeding is now based. The suit in equity was thereupon tried before a jury, as the act provides it shall be; and, a verdict having been rendered in favor of the Commonwealth against all defendants, judgment was entered forfeiting the title of appellants, and each and all defendants, to the land described in the petition under the patents named. From that judgment this appeal is prosecuted.

It is shown by the evidence that neither appellants, nor any of the defendants, nor the original patentees, nor any person in privity with their title, either listed the property as of September 15, 1901, September 15, 1902, September 15, 1903, September 1, 1904, and September 1, 1905, or paid any taxes thereon levyable and assessable as of said dates, nor paid any taxes whatever thereon since the year 1825, although the patents were issued prior to the year 1800. In fact, the majority of them were issued by the State of Virginia prior to the year 1792, when Kentucky became a State. Prior to the year 1825 there was only an intermittent listing and payment of taxes upon some of the patents, the whole amount to be paid not exceeding, perhaps, $100.

The various objections to the act upon constitutional grounds were urged in the original appeal of Eastern Kentucky Coal Lands Corporation v. Commonwealth, 106 S. W. 260, 32 Ky. Law Rep. 129, and in the case of Kentucky Union Company v. Commonwealth (decided March 25, 1908) 108 S. W. 931, not only upon oral argument, but also in exhaustive briefs

filed on behalf of appellants upon the appeal, and again with the petition for rehearing. 110 S. W. 398. Because of the importance of the questions involved, the time for oral argument was extended in each case, and the questions presented in argument and brief received careful consideration. In each of these cases we concluded that the act in question violated no provision of the Constitution, either Federal or State. This conclusion is not shaken by the able reargument on this appeal, and we now approve of and adhere to the opinions in those cases. In conformity with those opinions we hold that article 3, as construed by this court, does not violate the provisions of the Federal Constitution denying the passage of any State or ex post facto laws, laws impairing the obligations of contracts, or laws denying to any person the equal protection of the law, or depriving any person of his property without due process of law. This construction of said article is abundantly supported by the following authorities: Polk v. Mutual Reserve Fund Life Ass'n, 207 U. S. 910, 28 Sup. Ct. 65, 52 L. Ed. —; Soper v. Lawrence Bros., 201 U. S. 359, 26 Sup. Ct. 473, 50 L. Ed. 788; Kelly v. City of Pittsburg, 104 U. S. 78, 26 L. Ed. 659; Fay v. Crozer (C. C.) 156 Fed. 496; Asbell v. State of Kansas (U. S. Supreme Court, March 23, 1908) 28 Sup. Ct. 485, 52 L. Ed. —; King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; Reed v. Dingess (C. C.) 56 Fed. 171.

The opinions in the former appeals of Eastern Kentucky Coal Lands Corporation and Kentucky Union Company v. Commonwealth do not conflict with the cases of Commonwealth v. Ingalls, 89 S. W. 156, 28 Ky. Law Rep. 164, and Spalding, Revenue Agent v. O'Callaghan's Executrix, 76 S. W. 189, 25 Ky. Law Rep. 629, relied upon by appellants. In those cases the effort was made to list the same property for the same years in the name of different persons in privity with each other—a pure sample of double taxation. It was held that such was not the intention of the Leg-

islature, and that the Commonwealth, like any other litigant, would not be allowed to play fast and loose. In argument it was admitted by appellee that the lower court erred in sustaining a demurrer to the answer of Twyman. This answer set out at length the petition filed by him in the county court. In this the land which he sought to have listed was specifically described so it could be identified. He sought to list the whole tract, without indefinite exclusions or exceptions. He did not seek to shift to the court the burden imposed upon him by the act. So far as his petition disclosed, he was the owner of the entire tract which he sought to list, and not merely such parts thereof as were not owned by others. His petition was unlike that of appellant Eastern Kentucky Coal Lands Corporation. He was seeking to avail himself of the provisions of the act, and had done all that could be reasonably required of him.

Appellants G. B. Gill and others, did not appear in the lower court, but sued out an original appeal in this court. The action against them not only conformed to the provisions of the Code as against nonresident and absent defendants, but also to the additional requirements of the act as against such defendants, and they are bound by it.

For the reasons indicated, the judgment of the lower court is affirmed as against appellants Eastern Kentucky Coal Lands Corporation and G. B. Gill and others, but reversed as to appellant J. C. Twyman, and remanded for further proceedings consistent with this opinion.

Judge Hobson does not dissent from the opinion, because he deems the matters concluded by former opinions of the court, although he adheres to the conclusions stated in his dissenting opinion in those cases.

KENTUCKY UNION COMPANY v. COMMONWEALTH.

APPEAL FROM LESLIE CIRCUIT COURT.

Opinion of the court by Judge Lassing, Affirming in Part, Reversing in Part.

This appeal presents for consideration questions as to the Constitutionality of article 3 of the revenue and taxation act, approved March 15, 1906 (Acts 1906, p. 115, c. 22), and of practice and procedure thereunder. On the 20th day of April, 1907, the Commonwealth of Kentucky, by Ira Fields, Commonwealth's Attorney, in and for the Thirty-third judicial district of Kentucky, which includes Leslie county, filed its petition in the Leslie circuit court against appellant, alleging, among other things, that on the 12th day of June, 1872, the Commonwealth of Kentucky granted to Stephen G. Reid, by letters patent 40,000 acres of land in Perry, now Leslie county, Ky., a copy of the grant being filed with, and as a part of, the petition. The petition also described the land by metes and bounds, courses and distances, and alleged that the corporate defendants, appellant here, under, through, and by virute of divers mesne conveyances from the patentee, was the claimant of said tract of land under said patent. The petition further alleged that appellant and its predecessors in title had failed to list said tract of land, or any part of it, for assessment or taxation, as of September 15, 1901, September 15, 1902, September 15, 1903, September 15, 1904, and September 15, 1905, and had so failed to list the same as of each and all of said dates, and had failed to pay the taxes charged, and which should have been charged against said tract of land assessable as of said dates, and had failed to pay such taxes assessable as of any of said dates. The prayer was for judgment against appellant, forfeiting and transferring to the Commonwealth of Kentucky all of appellant's claim, title, right, and interest in and to all of said tract of land and for costs. By amended petition the

prayer was enlarged and asked for a sale of all the title, interest, and claim of appellant in and to all of said tract of land. Appellant appeared and filed general demurrer to the petition at September rules, 1907, which was overruled at the regular October term. The appellant elected to stand on its demurrer, and declined to answer. At the same term the case was set down for hearing and trial before a jury, and, upon a verdict in favor of plaintiff, the court entered a judgment forfeiting and transferring to the Commonwealth the right, title, interest, and claim of appelant in and to said tract of land described in the petition and judgment; and further adjudged that the title so forfeited and transferred to the Commonwealth be sold by the master commissioner. The judgment contains the usual provisions for a sale by a master commissioner, and authorizes the commissioner to sell said tract of land as a whole or in parcels to suit purchasers. By further provision of the judgment, the master commissioner was directed not to advertise the sale until after the close of the regular February, 1908, term of court. Complaining of errors in this judgment, appellant prosecutes this appeal.

Appellant, confessing as true the allegations of the petition, relies for a reversal upon the alleged unconstitutionality of the act upon which proceedings were based, and further claims that as the petition did not allege, nor the judgment ascertain, what parts of the 40,000 acres had been occupied, and taxes paid thereon by occupants, the petition is defective, and the judgment erroneous. The questions thus presented for determination by this court are: (1) Is article 3 of the revenue and taxation act, approved March 15, 1906, a constitutional exercise of legislative authority? (2) Is the judgment erroneous, in that the petition fails to allege or the judgment to ascertain the various persons who had occupied and paid taxes on lands within said 40,000-acre boundary for five years next preceding the judgment of forfeiture? (3) Did the court err in entering judgment of sale at the same term of court at which the judgment of for-

feiture was entered? The constitutionality of this article was considered and upheld by the court in an exhaustive opinion written by Chief Justice O'Rear in Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667, 106 S. W. 260, 32 Ky. L. R. 129, and it is not necessary to again refer to the various objections there urged and passed upon by the court. Upon further consideration, we are satisfied that the conclusions there reached are correct.

It is contended by appellant that under the act of 1906 a failure to list land for assessment and to pay the taxes thereon for the years 1902, 1903, 1904, 1905, and 1906 is visited with a different and heavier penalty than was provided by law in force during those years. It is by no means certain that the act accomplishes any such result; but, if it did, it would result in making void only the penalties and interest provided for the default, and would not affect any other portion of the act. The act expressly provides that it is enacted in detail, and that each provision shall stand by itself, unaffected by any other portion that for any reason might be invalid. The act is a comprehensive revenue measure, and this result would follow had there been no such provision. It was clearly competent for the Legislature to prescribe that the amount to be paid to remove cause of forfeiture should be the taxes, without interest or penalties, for the years named; and if, in adding penalties and interest, the Legislature exceeded its constitutional authority, the article would be void only so far as it exceeded such authority, and the penalty and interest would be eliminated. The penalty and interest can be stricken out, and that which remains is complete within itself, and capable of being executed in accordance with the apparent legislative intent. Similar objections were urged in Hoke v. Commonwealth, 79 Ky. 567, 3 Ky. Law Rep. 407, and Muir's Adm'r v. City of Bardstown, 120 Ky. 739, 87 S. W. 1096, 27 Law Rep. 1150, and in each case where penalty was provided the act was held void only to the extent of the penalty imposed.

No question, however, concerning the validity of the provisions of the act as to what penalties the appellant should pay for its delinquency during the years 1902, 1903, 1904, 1905, and 1906 arises in this case. It has not attempted either to list its land or to pay any taxes, though the act gave ample time, after it became a law, for compliance with its provisions. Mulvey v. Boston (Mass.) 83 N. E. 402 (decided January 14, 1908); Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Black on Tax Titles, sections 279-286. Had the appellant attempted to comply, it could then have contested or disregarded any unconstitutional provision of the act. As we held in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667, 106 S. W. 260, 32 Ky. L. R. 129, it was competent for the Legislature, in the exercise of the taxing power, to provide a forfeiture for a failure to list property for assessment and pay the taxes due thereon. The penalty of forfeiture provided by the act is not for a past delinquency, but for a failure to list and pay after the act went into effect, and within the time there provided. We are here concerned only with this feautre of the act, and it has no semblance of an ex post facto law.

Appellant contended that, if the act is constitutional, the petition is defective, and that the general demurrer thereto should have been sustained, because the petition fails to disclose what parts, if any, of the land described in the petition, is held by occupants who have paid taxes thereupon for the five years preceding the judgment of forfeiture; and that the judgment is erroneous because it does not segregate the parts to which the forfeited title would inure. So far as disclosed by the record, there is no part of the tract held by occupants. But the court judicially knows, and it was admitted in argument, that practically, if not quite, all the land described in the petition is adversely held by occupants under claim or color of title. The record shows only that the appellant is the owner or claimant of the title to the tract of land, which is specifically described by metes and bounds,

courses and distances, and that appelant has failed to comply with the provisions of the article with respect to the listing of it for taxes and the payment of taxes thereon. The petition contains the allegations necessary to show that appellant was delinquent, and its title subject to forfeiture, and the demeurrer thereto was therefore properly overruled. Nor is the judgment erroneous on that ground. Certainly the title to the tract of land described in the petition, and which is adjudged to be subject to forfeiture and sale, can be sold by the same description, the purchaser taking that which, under the article, passes at the sale. The doctrine of caveat emptor applies in this, as in other proceedings. And the purchaser, and not the occupant, as argued by counsel for appellant, would be required to show, in actions to recover under his purchase, that the land claimed by him was not of the excluded class. The rule is universal that, where one seeks to recover under a grant or deed which does not convey all the land within the boundary described, he must show that the land sought to be recovered is within the boundary and without the exclusions. Hall v. Martin, 89 Ky. 9, 11 S. W. 953, 11 Ky. Law Rep. 241. The act provides that the deed shall transfer to the purchaser the title and claim "so forfeited and transferred to, and vested in, the Commonwealth, as remains in it after the operation of section six of this article, and shall so recite." The article, taken as a whole, clearly shows that such was the legislative intent. It is not necessary for the petition to describe more than that the tract of land the title to which is sought to be forfeited. After the judgment of forfeiture becomes final, the main purpose to be conserved is the interest of the Commonwealth, and circumstances might arise or be shown to exist that would authorize different modes of executing it. We have no hesitancy in holding that it is not necessary for the judgment to ascertain and describe the parts of the tract held by occupants. If at the hearing it should be made manifest that the title as to certain parts only of the tract

would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event, it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold. Therefore the judgment appealed from, in so far as it authorizes the commissioner to sell the tract as a whole or in parcels to suit the purchaser, is erroneous.

Another error in the judgment of sale is that it was rendered at the regular October term, 1907, of the Leslie circuit court, the term at which the judgment of forfeiture was entered. By section 4 of article 3 it is provided that "if before or during the term of circuit court, next preceding the term at which a judgment of forfeiture may have been entered," the defendant in privity with the title so vested in, and forfeited to, the Commonwealth, should file his counter-claim, accompanied by bond, and ask to be allowed to purchase back the property, he should be allowed to do so upon the terms prescribed in the article. The defendant, by the express provisions of the act, has until the close of the first term of court after the term at which the judgment of forfeiture is entered in which to file this petition; and it was error for the circuit court to order a sale of the property before the time had elapsed in which the defendant could file his petition and bond to purchase back the property. It is insisted that this premature entry of the judgment of sale is not error because it becomes inoperative if the defendant should, within the time authorized by the act, file its petition to purchase the property back. But the judgment of the court was a final order from which an appeal could be, and now is being, prosecuted, and the circuit court has no control over it, after final adjournment of the term at which it was entered. The judgment of sale therefore was erroneous.

It is earnestly insisted that the article in question is a repeal to a certain extent, at least, of the statute against champerty. But in this we do not concur. The purchaser, in an action to recover the land, or part thereof,

would still be required to prove his claim of title as if there had been no forfeiture or sale. The utmost that could be claimed is that the commissioner's deed made pursuant to a judgment of court is not ordinarily subject to the provisions of the statute as against champerty. Conceding this to be true, the only link in the chain of title against which the plea of champerty could be interposed would be the commissioner's deed made pursuant to the sale directed by the judgment and this plea would not extend to any link in the chain of title antecedent to the commissioner's deed. But is the commissioner's deed made under this article subject to the plea of champerty? In section 3 of the article in question it is provided that "no other title, claim, or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited, or in any manner affected by said proceeding." And by section 4 of the article it is provided that "no person except a defendant, and no defendant except as herein provided, shall be allowed to purchase back from the Commonwealth, the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish in such proceeding, a title thereto in himself, upon which he could maintain an action of ejectment." As was stated in Farmers' Bank of Kentucky v. Peter, 13 Bush, 591: "The purchaser takes what he gets. The rule of caveat emptor applies in all its vigor to sale of real property" —the sale referred to being a sale by a commissioner under decree of court. From the provisions of the act above quoted it is manifest that it was not the intention of the Legislature to take from an occupant any defense that he might theretofore have had, whether of champerty or otherwise. It is expressly stated that no title, claim, possession, or continuity thereof, by whomsoever owned, shall in any manner be affected by said proceeding. We are therefore of the opinion that the benefit of the plea of champerty is not only not taken from the occupant, but it is preserved to him as against the commissioner's deed itself, and that such deed does not come

within the general rule that the plea of champerty is not available as against a commissioner's deed. Commonwealth v. Rosenfield Bros. & Co., 118 Ky. 374, 80 S. W. 1178, 82 S. W. 433, 26 Ky. Law Rep. 726, the court, quoting from Endlich on Interpretation of Statutes, section 295, says: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to the manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This is done sometimes by giving an unusual meaning to particular words, sometimes by altering their collocation, or by rejecting them altogether, or by interpolating other words—under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus given are mere corrections of careless language, and really give the true intention. The ascertainment of the latter is the cardinal rule, or rather the end and object, of all construction; and, where the real design of the Legislature in ordaining a statute, although it be not precisely expressed, is yet plainly perceivable or ascertained with reasonable certainty, the language of the statute must be given such a construction as will carry that design into effect, even though in so doing the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter." This rule is re-enunciated in an opinion of this court by Judge Barker, filed March 17, 1908, in the case of Morrell Refrig. Car Co. v. Commonwealth of Kentucky, 128 Ky. —, 108 S. W. 926, 32 Ky. Law Rep. 1285. If it were possible to construe the act in question as contended for by appellant with respect to champerty, which we do not hold, the rule announced by this court in the above cases would preclude such a construction. But there is nothing in the act indicating such an intention upon the part of the Legislature. Its whole pur-

port is to the contrary, and by specific provision it declares that the title, claim, or possession of the occupants, or the continuity thereof, should not, in any manner, be affected by the proceedings. If the occupant has had five years' possession, coupled with the payment of taxes, the forfeited title devolves upon him. If he has not had possession for a sufficient length of time to cause a vestiture of title in him, he nevertheless is in possession; and, as a sale of the forfeited title to the extent of his possession would be champertous, the title thereto remains in the Commonwealth, and the possession of such occupant, or the continuity thereof, is not in any manner affected thereby. The title to those parts not transferred to the occupant, or which is not adversely held, is alone the subject of sale, and the title to only such parts would pass upon a sale in gross.

The judgment is affirmed in so far as it adjudges a forfeiture of the title and claim of appellant, but for the reasons indicated, and because it orders a sale of the land and not of the forfeited title, it is reversed for proceedings not inconsistent with this opinion.

On rehearing.

Complaint is made in the petition for rehearing that the opinion herein fails to state whether or not article 3, c. 22, p. 115, Acts 1906, violates the Constitution of the United States. This question was fully considered and passed upon in the recent case of Eastern Kentucky Coal Lands Corporation v. Commonwealth, 127 Ky. 667, 106 S. W. 260, 32 Ky. Law R. 120, and it was there held that the said article was not violative of any of the provisions of the Constitution of the United States. It is specifically urged that article 3 violates section 10 of article 1 of the Federal Constitution, in that it impairs the obligations of a contract, and the compact with Virginia is cited as the contract claimed to have been impaired.

Complaint is also made that said article violates section 1 of the Fourteenth Amendment, in that it deprives the owner of his property without due process of law, or that it denies to some persons the equal protection

of the law, and also that it is violative of clause 1, section 10, article 1, Constitution of the United States, which denies the right of any State to pass an ex post facto law. In none of these contentions do we concur. We see no reason for receding from the conclusions reached upon these several points in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth, above cited. There can be no serious objection to article 3 on the ground that it is an ex post facto law, in so far as the said article applies to years subsequent to 1906. But it is insisted that, as the act declares that delinquency for the years 1902, 1903, 1904, 1905, and 1906 shall be cause for forfeiture, which might have been removed on or before January 1, 1907, by the payment of the taxes and interest and penalties provided by law for the redemption of land sold for the non-payment of taxes, it visits upon the delinquent greater penalties than he was subjected to prior to the passage of the act. This would be true if the delinquent had voluntarily paid the taxes for those years; but the result is not necessarily the same had the delinqeunt been proceeded against by an officer authorized by law to collect back taxes; however, we are of opinion that the delinquent's liabilities for those years are to be measured by his liabilities had he volunteered to list and pay his taxes. It therefore follows that the article in so far as it requires the payment of interest and penalties for the years 1902, 1903, 1904, 1905, and 1906 is inoperative, and the delinquent for those years would be required to pay only taxes without interest or penalties. But, for the reasons and upon the authorities cited in the opinion and consistent with the rulings of this court, the elimination of the interest and penalties for the years 1902, 1903, 1904, 1905, and 1906 does not affect the other provisions of the article with respect to those years, or years subsequent thereto.

As the appellant is under no disability, does not claim under a grant from the State of Virginia, and did not seek to list its property, or offer to pay the taxes for the years 1902, 1903, 1904, 1905, and 1906, either with or

without interest and penalties, we hesitated in the opinion to pass specifically upon these questions raised by it. However, out of the consideration entertained for the eminent counsel presenting them, we have expressed our views upon these points, in order that he may have the benefit of specific adjudication thereon.

The petition for rehearing is overruled.

Opinion by Judge O'Rear.

Appellee was the owner or claimant by a title of record of some 90 grants, of 200 acres each, issued to De Groot, Meredith, Thickston, and Carmichael in the year 1870. The patents were taken out to cover solid bodies of land, and without reference to interference from older grants covering the same boundary, and without attention to claimants in possession, who might or might not have been entitled to notice and to pre-empt a certain quantity allowed by statute to actual settlers. The title claimed by appellee and his vendors had not been listed for assessment for any of the five years prior to 1906.

A comprehensive revenue statute was enacted by the General Assembly of 1906, which became effective in June of 1906. By the third article of the act it was made the duty of "each and every owner or claimant of land to pay all the taxes which had been assessed, and which should have been assessed, against him and those under whom he claims as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905." It was further provided by that act (section 1, art. 3, c. 22, p. 115, Acts 1906): "If said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided. The fact that said land has been listed for taxation, or the taxes have been paid thereon by another claimant shall not relieve against the

duty herein imposed." The act further provides that the owner or claimant, if the land has not been assessed as against them for as many as three of the years mentioned, shall forfeit his title unless he shall, after the act takes effect, and before January 1, 1907, list the lands for taxation in the manner provided by the act and pay the taxes and penalties due upon the assessment within the time. By the second section of the article there is provided the manner of listing the lands as required by the preceding section. It is made the duty of the owner or claimant to file his petition in the county court of the county where the land lies on or before January 1, 1907, "in which the land sought to be charged shall be described so as to be identified," etc.

Appellee filed his petition in the Leslie county court on December 28, 1906, in which he stated he was the owner by equitable title of 90 patents or grants, of 200 acres of land each, granted by the Commonwealth of Kentucky in the year 1870 to W. H. De Groot, H. B. Meredith, L. H. Thickston, and J. Carmichael, making a total of 18,000 acres to which appellee had a prima facia title. The only description of the several tracts covered by the 90 patents is as follows (giving here only a few as illustrating all the descriptions): "400 acres on the point on the west side of Main Cutshin creek; 200 acres, on top of the point between Sang fork of the Laurel fork of Greasy and Cutshin at Harlan county line; 200 acres at Rich Hollow, in head of Main Cutshin creek; 400 acres at fork of a small branch in head of Main Cutshin creek; 400 acres on a small point in head of Cutshin creek"—and so on. The petition further states: "That his information is, and he asserts that it is true, that said patents cover and include much land that had been surveyed and patented prior to the year 1870, the date of the grants aforesaid, and that the land actually held under said grants is very much less than 18,000 acres, to-wit, about 4,000 or 5,000 acres, and that taking said patents in the condition they now are the sum of $12,500 is a fair average cash value for the

years mentioned,, or for any year in which they have been omitted from the list of taxable property in Leslie county." This description was not a compliance with the statute, which required that in the petition the claimant should describe the land which he offers to list for taxation "so as to be identified." It is made worse by the qualification of the description contained in the clause quoted from the petition above. The qualification leaves more uncertain the location of the lands intended to be listed, as well as qualifies the value put upon the lands offered to be listed, by the fact that there are doubts as to the sufficiency of the claimant's title—a matter which the statute does not admit, but by clear implication, if not by express negation, forbids it, when it excludes the fact that any other person has listed or paid taxes on the land, or any part of it, from releasing the claimant now offering to list it from full liability for taxes upon it.

The county court acted upon a demurrer to the petition in February, 1907, holding the petition to be insufficient. Thereupon appellee tendered an amended petition, in which he does describe each tract fully and sufficiently by metes and bounds, and location, and name of patentee, together with statement of the claimants' deriviation of title from the patentee. But it does not withdraw—on the contrary, it left as it was—the modification of the boundary and title proffered to be listed, as contained in the foregoing quotation. The amendment was rejected, as being insufficient; and, the petitioner refusing to plead further, his petition was dismissed. He prosecuted an appeal to the Leslie circuit court. There he tendered and was allowed to file the amended petition which the county court rejected. This was done in August, 1908. At the same time appellee filed, over the objection of the Commonwealth, a second amended petition, in which the foregoing qualification was not withdrawn or modified. In this last amendment a new and different description of the various tracts is given, in which it appears that appellee has eliminated all that

portion of his various boundaries which conflicted with what he conceived to be better titles. The net result was he described 6,549 acres out of 18,000 acres which his patent covered, and offered to list the smaller acreage at $5 per acre. The circuit court allowed this course, and so adjudged. From that action of the circuit court the Commonwealth prosecutes this appeal.

The validity of article 3 of the revenue act of 1906 was before this court in the case of Eastern Kentucky Coal Lands Corporation v. Commonwealth, 106 S. W. 260, 32 Ky. Law Rep. 129, and was there sustained. In that case it was held that the act under consideration partook of revenue and police features; that a time was given by the act after it became effective, to-wit, until January 1, 1907, to comply with its requirements as to listing omitted property which had been omitted for the five years named in the act; that the description of the petitioner's lands must be such as to identify them with reasonable certainty; and that the claimant had not the right to exclude from his boundaries those lands covered by his title to which others had, or were conceded to have, a superior title to that of the claimant; that it was the duty of the claimant to list his title, whether good or bad; that it was his title or claim, such as it was, that was aimed by the act to be taxed; and that his omission or exclusion of parts of his boundary was a violation of the act, and failed to bring him within its saving provisions. The petition in this case is subject to all the vice, differing only in degree, that the petition in the case cited was subject to. Neither the petition nor the amendments were a sufficient compliance with the act, and should have been dismissed.

The act provides that the county court shall act as an assessing tribunal. It is limited as to the time within which it could act. The appeal to the circuit court was to provide against error in the action of the county court. It was not intended, by providing for an appeal, to extend the time within which the recusant taxpayer could list his omitted property. That would be a premium upon

further delay, a temptation to dally longer with an urgent duty, which practice had not only exhausted the patience of the Commonwealth, but had defeated it in the effort to collect many thousands of revenue from this class of property holders. If the county court had acted erroneously in rejecting the petition or amended petition tendered to it, that error could have been remedied on appeal to the circuit court. But when the county court ruled properly on the petition and its amendment, and the taxpayer failed to tender to that tribunal, within the time allowed by the act, a sufficient petition, the grace allowed by the statute was exhausted. It could not be revived and extended by an appeal to the circuit court, where, after the time allowed by the act, the taxpayer could for the first time proffer in sufficient form to do what the act required should have been done within the specified time, which expired January 1, 1907.

The judgment is reversed and cause remanded, with directions to dismiss the petitions.

LOCKARD, ETC., v. COMMONWEALTH.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Barker, reversing.

In the year 1873 the Commonwealth of Kentucky issued to C. O. Lockard a patent for a boundary of land lying in Harlan and Leslie counties, which on its face purported to convey to him 40,400 acres of land. Much of the land included within this boundary was in the adverse possession of others, and perhaps more covered by prior patents. Be this as it may, however, Lockard seems never to have known exactly the number of acres under the patent which he could legally call his own; but in each year after the issuance of the patent he listed for taxation in Harlan and Leslie counties 15,000 acres of land, about one-half in each county. Prior to the institution of this proceeding he seems to have brought an action in the Federal court against a large number of persons and recovered judgment against them, by which it was determined that he was the owner of some 40,400 acres of land. After this judgment, in 1908, this proceeding was instituted in the Leslie Circuit Court for the purpose of forfeiting so much of the patent as had not been listed for taxation; in other words, all except 15,000 acres, upon which the taxes had been paid. Lockard or his heirs had conveyed to F. M. Sackett and D. B. Cornett certain boundaries of his patent, and they were made parties defendant to this procedure. The defendants pleaded the listing of the land and the payment of the taxes in bar to the right of forfeiture on the part of the Commonwealth, and the vendees pleaded their purchase prior to the institution of this action. The trial before a jury resulted in a peremptory instruction for F. M. Sackett, one of the vendees, and a judgment against the heirs of Lockard and against D. B. Cornett, forfeiting all of the patent except that which had been sold to Sackett. To review this judgment, this appeal has been prosecuted.

A great number of questions of law have been raised and ably discussed by counsel on the respective sides of this litigation, but the view we have taken of it renders it unnecessary for us to notice but one. This procedure is under that section of the revenue statute enacted in 1906 which is embraced in Kentucky Statutes, Sections 4076b to 4076k, inclusive (Russell's St., Secs. 5970-5983). The history of this statute was fully set forth and the validity of the act upheld in the case of Eastern Kentucky Coal Lands Co. v. Commonwealth (Ky.), 106 S. W. 260, 27 Ky. 667, Kentucky Union Co. v. Commonwealth (Ky.), 108 S. W. 931, and Eastern Kentucky Coal Lands Co. v. Commonwealth (Ky.), 108 S. W. 1138, 27 Ky. 667; and it is not necessary for us to do more than to refer to these opinions for the purpose of upholding the validity of the act. In those cases it was held that the old land grants which had never been listed for taxation at all might be forfeited under the statute by the failure of the owners to comply with its terms. But we have no such case here. The owner of the astounding patent has, year by year, listed his patent for taxation, and the State authorities have accepted the returns made by him, and assessed the land, and received the taxes thereon from him. It may be true, and doubtless is, that Lockard owned a great deal more land within the boundaries of his patent than he returned for taxation, and it was entirely competent for the State officials to have refused to receive his returns, and thus forced him either to assess his whole patent or to come within the language of the forfeiting clauses of the statute; but they could not allow him to make the return of 15,000 acres under the belief that that was a satisfactory assessment, and afterwards forfeit the overplus for non assessment. This would be practically laying a trap to catch him unawares. Evidently Lockard and the fiscal officers of the State believed that 15,000 acres was about as much land as he could legally recover under his patent, and that this was a fair assessment for fiscal purposes. The object of the statute is to force the owners of outstanding patents to list their lands for taxa-

tion. It is notoriously true that there were a large number of outstanding patents in the hands of non-residents, which cast a cloud upon the title of the possessors of a large part of Eastern Kentucky; that the names of these non-residents were unknown; and that they had persistently, for a long period of years, failed or refused to return their lands for taxation. It was for the purpose of either forcing these owners to pay their taxes or to give up their claim to the land covered by their patents that the statute was enacted.

But it was never the intention of the Legislature, where an owner in good faith had each year after he received his patent listed what he thought or believed was all of the land that he could legally claim under it, and this return had been accepted by the fiscal officers of the State, that in a procedure such as this the remainder, if it developed that there was more than was returned, might be forfeited to the Commonwealth. The law does not favor forfeitures, and in order that they may be upheld or enforced there must be a clear and undoubted authority therefor. They can not be accomplished by indirection or by implication. They must be enforced by an undoubted decree of the law-making power. This principle is too elementary to require either elucidation by argument or the citation of authority. The condition that we have in this record is not covered by the language of the statute. At most it would only be by a strained construction of it that the land in question could be brought within its terms. This, as we have said before, is not permissible. The Lockard patent is neither within the language nor the spirit of the statute which the Commonwealth has invoked in this case. Of course, we do not mean to say, or intimate that the Commonwealth may not by appropriate procedure collect the taxes for the number of acres covered by the patent upon which the owner has not paid; but this is a very different proposition from forfeiting the land. We are of opinion that the motion of all of the defendants for a peremptory instruction to the jury

to find a verdict for them should have been sustained at the conclusion of the evidence.

For these reasons, the judgment is reversed, as to all of the appellants, for procedure consistent herewith.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Office Supreme Court, U. S.
FILED.
OCT 26 1910
JAMES H. McKENNEY,
Clerk.

No. 22.

KENTUCKY UNION COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

No. 47.

EASTERN KENTUCKY COAL LANDS CORPORATION, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

No. 48.

EASTERN KENTUCKY COAL LANDS CORPORATION, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

With Appendix Containing Constitutional and Statutory Provisions Referred to.

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BRIEF FOR DEFENDANT IN ERROR.

Article III of Act of General Assembly of the State of Kentucky, approved March 15, 1906, and relating to revenue and taxation, is analyzed as follows:

SECTION 1.

By this section it is made the duty of every owner or claimant of land to pay all the taxes which have been assessed

and which should have been assessed against him and those under whom he claims as the owner or claimant of said land, as of the 15th day of September, 1901, 1902, and 1903, and the first day of September, 1904 and 1905.

And further provides that if said owner or claimant, or those under whom he claims, have failed to list the same for taxation as of said dates or any of them, it should be his duty to have the same assessed and listed for taxation in the manner and within the time therein provided.

And further provides that the fact that said land has been listed for taxation or the taxes have been paid thereon by another claimant should not relieve against the duty therein imposed.

If the owner or claimant, or those under whom he claims, has failed to list said land for assessment or has failed to pay the taxes charged or which should have been charged against him or them, they are thereby declared to be delinquent, and such delinquency shall be cause for the forfeiture of his claim and title thereto in a proceeding to be instituted for that purpose.

Said cause for forfeiture, however, shall be extinguished if the owner or claimant should, within the time and in the manner in the article provided, cause said land to be assessed for taxation and pay the taxes charged thereupon, together with the interest and penalties provided by law in case of the redemption of land sold for the nonpayment of taxes.

(By decision of the Court of Appeals of Kentucky in the Kentucky Union Company case this requirement to pay interest and penalties was held unconstitutional, so that all the claimant has to do to relieve the cause for forfeiture is to pay what he would otherwise have been compelled to pay had he listed his property for taxation during the five years named.)

SECTION 2.

This section provides the manner in which the property should be assessed and the amount of taxes required to be paid ascertained. This is done by filing in the county court a petition on or before January 1, 1907, in which the land sought to be charged shall be described so as to be identified; and shall specify also the years for which the land was not listed and the years in which the taxes were not paid, and also the grant under which he claims, if under a grant, and the devolution of his title.

It is made the duty of the county court to decide said application upon such evidence as may be offered, having due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which should have been paid as of said dates. Upon finding the amount it is made the duty of the court to ascertain the proportion of such taxes due for county and State purposes at the rates fixed by law for such years.

The amount so ascertained for State and county purposes is required to be certified to the auditor and county clerk.

If the court should find that the land had been assessed as of any of said dates it is required to accept such assessment as the basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made.

From the judgment of the county court either the petitioner or the Commonwealth is granted the right of appeal to the circuit court, whose duty it is made to hear and determine said application *de novo*, and to give it precedence over all other civil business. The finding of the circuit court is declared to be conclusive, and not subject to appeal. (The word "finding," as here used, is held by the Court of Appeals in Eastern Kentucky Coal Lands Corporation *vs.* Commonwealth, 127 Kentucky, to refer to the value of the property as fixed by the circuit court; but does not limit the

right of appeal provided by general law on question of liability.)

By further provisions of this section it is made the duty of the claimant to pay the amount of taxes assessed by the court within thirty days after the time of the entry of the order fixing the amount, either in the county court if no appeal is prosecuted, or in the circuit court if appeal is prosecuted to it; and further providing that the cause of forfeiture provided for in section 1 should not become complete until after the lapse of said thirty days.

(This time, thirty days, is the time allowed by general law to corporations to pay franchise tax after the amount is fixed by the board, failing to do which subjects them to a penalty of $1,000 and $50 for each day's delay.)

Section 3.

Section 3 makes it the duty of the Commonwealth's attorney to institute proceedings in the circuit court upon failure of the owner or claimant to have the land assessed or failure to pay the taxes charged, for the purpose of declaring the title or claim of said defendant forfeited to the Commonwealth, and selling same.

In addition to the provisions of the civil code with respect to process and service thereof, both actual and constructive, it is made the duty of the clerk to post a copy of the petition, together with all exhibits, at the front door of the court-house. The proceedings are in all respects to conform to the requirements of the Code in other cases.

If the court finds that the title or claim sought to be forfeited is the subject of forfeiture under the provisions of article III, it is made its duty to render judgment declaring the same forfeited and title thereto vested in the Commonwealth without execution of deed. If the court should find that the same is not subject to forfeiture, the petition should be dismissed. Issues as to whether or not the same

is subject to forfeiture are triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

The proceedings shall not be subject to sections 391, 410, 414, or 574 of the Civil Code.

(Section 391 relates to the right of an infant to show cause against a judgment within twelve months after attaining age.

(Section 410 relates to execution of bond before rendition of judgment against a defendant constructively summoned.

(Section 414 grants to a defendant constructively summoned who did not appear five years within which to have the action retried.

(Section 574 requires depositions to be taken upon interrogatories in cases where all defendants are constructively summoned and none appear, or where all are under disability.)

From the judgment of the circuit court decreeing forfeiture or from the judgment dismissing the petition either party may prosecute an appeal to the Court of Appeals.

Section 4.

Under this section it is provided that any of the defendants in privity with the title so forfeited may purchase back from the Commonwealth the title forfeited to and vested in it by filing his petition and counter-claim in the pending action for forfeiture either before or during the term of the circuit court next succeeding the term at which judgment of forfeiture may have been entered, tendering with his counter-claim a bond that he will abide by and perform the judgment of the court thereupon.

In such case it is made the duty of the court upon proper pleadings and the evidence to ascertain and adjudge the amount of unpaid taxes charged, and that ought to have been charged, for fifty years immediately preceding the

filing of such counter-claim, and to enter a judgment against the defendant for the amount thereof, together with interest at the rate of 15 per cent per annum, including a reasonable attorney's fee for the Commonwealth's attorney, to be fixed by the court.

The right to purchase back is limited to such a defendant as might, except for such forfeiture, establish title to the land in himself and upon which he could maintain an action in ejectment.

If the defendant should pay to the sheriff the amount so adjudged, it is the duty of the court to enter judgment retransferring to the defendant the title forfeited to and vested in the Commonwealth.

(It will be noted that under this provision the reinvestiture is coextensive with the divestiture. In other words, title to the entire tract, and not title to such parts thereof as is not vested in an occupant, is retransferred. There is in this respect a marked difference between the Kentucky and the West Virginia law, as under the latter there is no right to redeem any land except that which is not vested in an occupant. Another marked distinction between Kentucky and West Virginia law is that the amount to be paid under the Kentucky law, while measured by the number of years the taxes are in arrears, cannot exceed fifty. Under the West Virginia law all unpaid taxes back to a specific year, 1863, must have been paid, so that as time goes by payments will have to be made under the West Virginia law for a period longer than fifty years.)

This section further provides that if the defendant should not pay the amount of said judgment the court should enter an order directing the sale of said title and claims, and the amount realized shall be used in the payment of costs and commission, and the remainder paid to the State and county: Provided further, That if the sale does not produce enough to pay the *costs*, an action may be maintained upon the bond for the costs and reasonable attorney's fees (but

does not include the unpaid taxes). By further provision of this section an appeal may be prosecuted from this judgment to the court of appeals, except that the judgment of the circuit court as to the amount of taxes in arrears shall not be subject to appeal.

This section further provides for the disposition of the amounts paid to the sheriff, requiring him to pay costs, and the remainder to the county and State, in proportion to their respective interests.

Section 5.

This section provides that an owner or claimant who instituted proceedings under section 2 to have his property listed, and who did not pay the amount therein ascertained as charged and chargeable against him, should not be allowed the right to purchase back under the proceedings authorized by section 4.

(This is inserted to prevent such owner from playing fast and loose, which he might otherwise do, by filing petition under section 2; and if the amount charged against him was in excess of that which he would be willing to pay, he could otherwise take his chances under section 4. This is inhibited by section 5.)

Section 6.

This section provides that all title and claim proceeded against under this article and forfeited to and vested in the Commonwealth and not purchased back as authorized in section 4, whether such forfeiture be for past or future delinquencies, should be and are thereby transferred to and vested in any person for so much thereof as such person, or those under whom he claims, has had actual adverse possession for five years next preceding the judgment of forfeiture under claim or color of title, and who has paid taxes thereupon for the said five years.

Section 7.

This section provides that all title and claim transferred to the Commonwealth under the provisions of the article and not purchased back by the owners, as provided by section 4, or not vested in an occupant, as provided in section 6, should be sold to the highest and best bidder for cash in hand; makes the usual provision with reference to advertisement and sale, and provides for a distribution of the money received upon sale as follows:

(1) Costs.

(2) To the county and State in proportion to the amount due them.

(3) The remainder shall be paid over to the former owner.

Section 8.

This section limits the right to enforce forfeiture under this article to proceedings instituted within five years from the accrual of the cause of action.

Section 9.

This section provides that all delinquent taxpayers within its provisions, or who come within its provisions, shall, after its passage, proceed under this article instead of under the general law.

Section 10.

This section, by general terms, makes the provision of the article applicable to future delinquencies and provides that the methods to enforce forfeiture in case of future delinquencies shall be the same as those provided by the act for past delinquencies.

Article III did not impose any new obligations upon plaintiffs in error, nor seek to tax that which was not taxable before.

That all property which is the subject of ownership, claim, or transmission from one person to another, either by deed, gift, devise, or otherwise, is subject to taxation, is clearly shown by constitutional and statutory provisions in effect from a time antedating the time as of which article III requires the owner of land to list the same for taxation.

Constitutional Provisions.

Section 170, after prescribing what shall be exempt from taxation, proceeds as follows:

> "and all laws exempting or commuting property from taxation, other than the property above mentioned, shall be void."
>
> "SECTION 171. They (taxes) shall be imposed on all property subject to taxation within the territorial limits of the authority levying the tax."
>
> "SECTION 172. All property, not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."
>
> "SECTION 174. All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution."
>
> "SECTION 175. The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

Statutory Provisions.

> "SECTION 4020. All real and personal estate within this State * * * shall be subject to taxation unless the same be exempt from taxation by the Constitution."

"SECTION 4021. The Commonwealth * * * shall have a lien on the property assessed, for the taxes due (it) which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien. * * * When any lands or improvement shall not be assessed in any one year, it may be assessed retrospectively in the manner provided for by law for that year at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime."

"SECTION 4024. All estate, real and personal, and all interest in such estate, named and specified in the tax book, shall be assessed for taxation." * * *

"SECTON 4025. Lands shall be valued for taxation without reference to conflicting title." * * *

"SECTION 4064. Any person who has failed to give in his list of taxable property, in whole or part, because he was not called upon by the assessor, may, at any time, and it is hereby made his duty, after the assessor has returned his books, to list the same with the county clerk."

Under these constitutional and statutory provisions we claim that article III of the act of 1906 did not impose a new duty upon the plaintiffs in error; that it was their duty and the duty of those with whom they are in privity in title to list the property for each and every year mentioned in the article, and that as to them the only effect of article III is to change the method of assessing their property and the manner of paying the taxes thereupon, when the same shall have been assessed. In other words, as to past delinquencies, the act prescribes that owners, whose lands were not listed by the assessor, shall list the same in the county court upon the application provided in the act, instead of listing it with the county clerk in an undefined manner, as theretofore provided; and the penalty that follows resulting in ultimate forfeiture, if he does not comply, is inflicted,

not because he failed to list in the years named, but because of his failure to list after the passage of the act and in the manner therein provided, and before January 1st, 1907. This is merely a matter of classification under the provisions of the Federal Constitution requiring due process of law, and will be considered under that head.

But it is claimed by plaintiffs in error that article III seeks to compel the listing of mere "claims" as contradistinguished from ownership, and further, that when the State once taxes a tract of land its power further to tax it with respect to the ownership of other persons is exhausted; and that for some unknown or occult reason the Federal Constitution prevents a State from requiring the true owners of property to pay taxes upon it where an adverse claimant has paid taxes on the same land.

One serious trouble with this contention is that in Kentucky land is not and never was taxed. It has been the policy of the laws of Kentucky ever since its foundation to tax owners with respect to the property owned by them, though, of course, in general terms the taxation of land and property is referred to. In some States, we believe, it is customary for the land to be taxed directly, not as the subject of ownership by a particular person, but is itself an object of taxation. In those States it is not listed for taxation as belonging to any particular person, but merely listed for taxation as a tract of land, so that the payment of the taxes upon such tract of land by any person discharges the claim that the State has. But this is not customary, nor is it required by any provision of the Federal Constitution, being in compliance merely with the policy and laws of that particular State.

But plaintiffs in error seek to shield themselves against the requirements of the act on the ground that "claims" to ownership of real estate are not the subject of taxation. They cannot shield themselves from taxation claiming to be the owners of the property upon the ground that a mere

"claim" is non-taxable. That very claim is property, protected by law, subject to taxation. They acquired it by deeds, as they allege in their answer to the petition for forfeiture. It passes to heirs upon the claimant's death, and is the subject of devise. It is real estate and cannot be transferred by parol. Justice Johnson, in Green *vs.* Biddle, 8 Wheaton, speaking of similar claims, said:

> "Land they were not, and yet all the attributes of real estate were extended to them and intended by the compact to be preserved to them under the dominion of the new State."

If they, as owners or claimants of the property, are excused from listing it from taxation because of dispute with reference to its title, then the occupants or other adverse claimants are likewise excused, and it would thereby be possible for both the county and State to lose an immense revenue. Such, in fact, would be the result in the pending cases, as under that rule no tax would be paid by any person upon a half million acres of land, more land than is in some counties. It was to cover this class of cases that section 4025 of the Kentucky Statutes was adopted, which requires the value of land listed for taxation to be without reference to conflicting title. This section is but a continuation of similar section adopted by the legislature of Kentucky, *January 31, 1814*, which provided 'in rendering the value of land and town lots the real value shall be given without regard to any conflicting claim or title' (2 Morehead *vs.* Brown, 1370), and such has been the law ever since.

This section necessarily contemplates the listing of the property by each claimant as a separate and distinct ownership, and that the same should be so done without deduction from the value on account of conflict in title. If it is not the duty of each to list under this section, upon which of the various claimants does it devolve? That it was the intention of the legislature that each claimant to property

should list it independent of the constitutional and other statutory provisions hereinbefore referred to is shown by the early history and legislative enactment of Kentucky prior and subsequent to the adoption of what is now section 4025, originally adopted, as above stated, January 31, 1814.

Prior to 1828 it was the duty of each owner or claimant of land to return with his lists to the assessor his several tracts of land, showing the title under which he claimed each. He was not allowed to list as one tract two adjoining tracts where he owned the separate tracts under different sources of title. (2 Morehead & Brown, 1368, act December 26, 1805.) He was required to show how he owned or claimed each tract, whether by patent, deed, will, or otherwise; and if he owned or claimed it under two or more different sources of title he was required to so show in his lists, and to pay taxes upon the land under each and every source of title. This continued to be the law until 1828, when by act of the General Assembly (2 Morehead & Brown, 1081), it was provided:

> "That hereafter, it shall not be necessary for the owner of any lands in this Commonwealth, in cases where he or she may hold a title under several claims, covering the same ground, to enter for taxation and pay tax, on more than one of those claims."

So far as we have been able to find, there was no change in the law requiring a land owner to list and pay taxes upon each source of title until the passage of the act above referred to in 1828; nor has such owner, at any time since then, been required by any act to pay upon different sources of title for the same tract of land.

Provision was made, however, by various acts to relieve such an owner where he had twice paid the taxes upon the same tract, *under the same title*.

The first of these acts was that of December 21, 1799 (2 Morehead & Brown, 1365), by which it was provided that—

> "Where the tax on any tract or tracts of land, have been, or may hereafter be twice paid for the same year, under the same title, upon the party's making satisfactory proof thereof to the court of the county in which he may reside, the court shall certify the same, and the sheriff shall give such person a credit for the amount thereof, in his taxes the next year, or any succeeding year; and the auditor shall credit such sheriff accordingly."

Provision for releasing the same person for the payment of taxes made by him upon the same land under the same title was continued in force under the various revisions of the statutes down to and including that of 1873 (General Statutes of Kentucky), chapter 92, article VII, section 3, page 726, wherein it was provided that—

> "If taxes have been twice paid upon land under the same title, in the same year, upon proof thereof before the county court of the county in which the last payment was made, within twelve months after such payment, such court may order the tax to be refunded to the applicant by the sheriff, if not paid into the treasury; and if so paid, to be refunded by the treasurer upon the warrant of the auditor."

This provision was left out in subsequent revisions of acts relating to revenue and taxation. Provision was made for the relief before payment of the taxpayer wrongfully assessed, but no relief was granted to him after he should once have paid the taxes.

The theory of all these acts was that each title is and was property, the subject of dominion, protected by the State, and therefore the subject of taxation and under the law taxable. It was only where two or more sources of title were united in the same person that the legislature in its discretion, in 1828, relieved such owner from the payment of taxes upon each title, but it never did exempt either of two adverse claimants from the payment of taxes.

As would readily be supposed, if the legislature required the same owner to list the same tract with respect to different sources of title, it required all adverse claimants to list the property as though owned by each of them, and this without deduction in value on account of the conflicting claims, as provided in act of January 31, 1814. This requirement has never been changed in the State of Kentucky, and the same act, in almost the identical words, has been carried forward into every revision of the statutes of Kentucky and now constitutes section 4025 of the Kentucky statutes.

This listing of the same land by different persons claiming under adverse titles is emphasized in the forfeiture act, passed by the legislature of Kentucky on December 21, 1799, in paragraph 5 (Toulmin's Laws of Kentucky, 76; 2 Litt., 462), in which it is provided that—

> "Any person * * * claiming lands in this State and failing to list the same for taxation * * * shall, for and in consequence of such failure, forfeit his or her claim to this Commonwealth: Provided, however, that such forfeiture shall not affect or invalidate the title of any other person or persons who may have a legal and different claim to the same land, who shall list and pay the tax due thereon, agreeable to law; but the claim or title of such person or persons, shall be and remain as valid and secure as if the claim which has been forfeited, in consequence of the land not being listed, had never existed."

This act clearly contemplated the listing for taxation by the holder of the legal title, and the forfeiture of his title if he failed so to do, and also the listing and paying taxes upon the same land by the occupant whose title was not to be affected by the forfeiture of the outstanding title.

To the same effect was the act of February, 1828 (2 Morehead & Brown, 1081), wherein it was provided that in all cases where lands had theretofore, or might thereafter, be forfeited to the Commonwealth, such forfeited title, interest

or claim should inure to and be vested in the person or persons in possession of the lands thus forfeited to the extent of the claim and possession of such occupant, and no further, provided that the occupant shall have a title either in law or equity to the land thus occupied; and provided further that such occupant should have legally paid the taxes due upon said land from the date of his purchase.

It is seen that the holder of the outstanding title was required to list his title or claim and to forfeit the same if he did not do so, and that the title thus forfeited would inure to the benefit of the occupant only in case he, too, had listed the property and paid taxes thereupon from the time that he became the owner thereof.

It is thus seen that that which is the subject of taxation is the owner's dominion, or assertion of dominion, and not the thing itself. The State protects assertions of dominion and provides courts for their establishment. For this protection given by the State it demands and exacts, and has the right to demand and exact, *pro rata* contribution upon the part of the claimant to the necessary expenses of the government.

This identical question was presented to the Court of Appeals of Kentucky in 1821, in the case of Olds *vs.* Commonwealth (3 A. K. Marshall, 465). In that case the owner of a billiard table resisted proceedings to have it listed as against him, upon the ground that it was claimed and listed by an adverse claimant and taxes thereupon paid by such adverse claimant. The court held that Olds was bound to have it listed and pay taxes upon it in his own name, and could not be excused for failing to do so by the act of another in listing it in his name.

This case, and the statutory provisions referred to, show that since the creation of the State of Kentucky claim to ownership of land is and have been property, and if property, may be taxed; and if taxable, is required by the constitution to be taxed. Consistent with the uniform rule in

Kentucky during all that time, Chief Justice O'Rear, speaking for the Court of Appeals of Kentucky, in Commonwealth *vs.* Gatliff (116 S. W., 65, not officially reported), said:

> "That it was the duty of the claimant to list his title, whether good or bad; that it was his title or claim, such as it was, that was aimed by the act to be taxed."

Analogous to this case, and as upholding the principles for which we are contending, we refer to the case of Elder *vs.* Wood (208 U. S., 226); St. Louis Mining and Milling Co. *vs.* Montana Mining Co. (171 U. S., 650), and Manuel *vs.* Wulff (152 U. S., 505).

In each of these cases it was held that the inchoate right vested in a locator of a mining claim under the United States statutes, which could be perfected only by subsequently complying with the requirements of the statutes, was property the subject of taxation and sale, though the land itself, being owned by the United States Government, was not the subject of taxation.

Such must necessarily be the rule in all the States, including Kentucky, Virginia and West Virginia, where title forfeited to the Commonwealth for non-listing, or for failure to pay taxes after assessment is had, inures to the benefit of the occupant who had paid taxes upon his claim. There are several States which adopted this method to clear itself from the incubus of stale claims. If the legal title holder was not compelled to list or pay because the adverse claimant had done so, his title could not be forfeited for failure to pay or list. If the occupant had not paid he did not come within the class to whose benefit the forfeited title inured. All such statutes must therefore have contemplated the payment of taxes by both claimants. The plaintiffs in error have no vested right in claim to exemption from taxation, though this exemption has existed as to one of them over 100 years and as to the other for 38 years. If their

claim should be upheld, property is not taxable as against them and there is and can be no way in which to compel them to list their property or pay taxes thereupon. Article III did not make taxable that which was not taxable before.

ARTICLE III MERELY PROVIDED A NEW REMEDY FOR THE COLLECTION OF TAXES DUE, AND THIS CAN BE DONE WITHOUT VIOLATING THE FEDERAL CONSTITUTION.

Assuming to be true, which we think we have demonstrated, that under the constitution and statutory provisions in effect prior to the adoption of article III, it was incumbent upon the plaintiffs in error to list their property and pay taxes thereupon, how have plaintiffs in error been affected by its enactment? Under the general law, as hereinbefore quoted, it was their duty to list the property with the county clerk if they had not been called upon by the assessor to list it; or they could have filed a descriptive list thereof with the clerk, and it was their duty so to do, under section 4039, Kentucky statutes. This section provides that nonresident owners of land shall file a descriptive list thereof in the clerk's office of the county in which the land lies, and that the assessors shall assess the same from that list; or the owners may, in lieu of filing the descriptive list, list it with the assessor, as otherwise provided. Should he fail in either of these duties, then, under section 4064, hereinbefore quoted, it was made his duty to list the same with the county clerk. Upon his failure so to do, proceedings to have the same listed could be instituted by various officers authorized by the general law, including the revenue agents, under section 4260, Kentucky statutes, or the sheriff (section 4241, *ib.*).

In these proceedings penalties are prescribed in addition to the taxes, out of which compensation to the officers is paid.

Under article III, where the delinquency has continued the length of time provided for, this omitted property must

be listed in the manner and within the time therein prescribed. That is to say, the duty is placed upon the owner to take the initiative in the performance of a duty which devolved upon him under the general law, which he has evaded. He is given a reasonable length of time in which to comply therewith; and if, after the passage of the act, he fails to list the property and pay the taxes, the forfeiture will take place. This is merely a new method to compel the payment of taxes already due.

> "The State may adopt new remedies for the collection of taxes and apply them to taxes already overdue without a violation of the Federal Constitution. The delinquent tax-payer has no vested right in any existing mode of collecting taxes, and there is no contract between him and the State that the latter will not vary the mode of collection."
>
> (Judson on Taxation, section 336.)

In Florida Central, etc., R. R. Co. *vs.* Reynolds, 183 U. S., 471, it appears that not only the property of the railroads of the State, but other real estate belonging to persons or companies other than railroads, had not been assessed for certain preceding years, though taxable under constitutional provision. The legislature enacted, in 1885, that all railroad property not assessed for the years 1879-'80-'81 should be assessed by the comptroller and paid, as in the act provided. The act did not apply to any property of a similar nature held by companies or corporations, other than railroads, and it changed the method of assessing the property from that prevailing under the general statutes.

This court, in an opinion by Mr. Justice Brewer, upheld the validity of the act, even when it applied exclusively to railroad property. While Mr. Justice Brown dissented, his dissent was not based upon the change in the method of collecting, but upon the ground that only railroad property was sought to be back assessed. His dissent, therefore, does not cover article III, here the subject of consideration, be-

cause under it all real estate that had not been assessed was required to be. We apprehend that no question will be raised in this court as to the right of the legislature to make this article apply to real estate alone and not personal property, because, so far as the Federal Constitution is concerned, the legislature may impose all taxes upon the one or the other.

The contention of plaintiffs in error is that article III is unconstitutional, because, as alleged, they are denied the equal protection of the laws. Equal protection of the law is nothing more nor less than a classification. The same position was taken in League *vs.* Texas, 184 U. S., 156. There the defendant contested the manner in which the State undertook to collect back taxes, and insisted, as the plaintiffs in error are here insisting, that the only method the State can adopt for the collection of back taxes is the method theretofore in vogue, which in that case had, and in the case at bar has, proved ineffectual. In other words, they claim a vested right in the inability of the State, under pre-existing laws, to compel them to pay taxes upon land owned, or claimed to be owned, by them, and therefore complain because article III provides a way by which they can be compelled to pay their taxes or surrender claim to the land. We do not apprehend that the Federal Constitution guaranteeing equal protection of the laws was intended to fortify plaintiffs in error in this position. In League *vs.* Texas, *supra*, it was stated that—

> "A State may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent without any violation of the Federal Constitution.
>
> "A delinquent tax-payer who fails to discharge his obligation to the State, compelling it to go into court to enforce judgment of taxes due upon his ground, has no ground for complaint, because he is charged with the ordinary fees and expenses of a lawsuit.
>
> "The 14th Amendment contains no prohibition of

retrospective legislation as such, and therefore now as before the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution."

In the case referred to the former method for the collection of taxes was by an administrative process. The new law made it judicial, and complaint was made on this ground and because of the extra costs attendant thereuopn.

The case further held that in the new remedy, as well as in the change from the old to the new, there was no violation of the constitution of the State of Texas, and that these questions were settled for the Supreme Court by the decisions of the court of last resort of that State.

Certain acts of the legislature of the State of Kentucky, with reference to the taxation of national banks, having been held unconstitutional, the legislature, by act of March 21, 1900, provided for the back assessment on shares of national banks owned by resident stockholders, and made the bank agent for those stockholders in the payment of this tax.

This court, after assuming, as found by the Court of Appeals of Kentucky, that for the years named the shares under the general provisions of law were taxable but had escaped taxation by reason of no specific provision for listing the same, held the act constitutional on the ground that it merely provided a new remedy for collecting a tax, liability for which already legally existed under a prior law. To the contention that during the years named the stock had been sold and transferred upon the faith that the same was free from taxation, the court held that they passed subject to the burden of taxtaion, and if not properly returned for taxation the liability could be enforced, although the stock had been transferred; that liability for a tax is not subject to rules applicable to the vendor's equity of one buying without notice. A man cannot get rid of his liability to a tax by buying without notice.

Citizens' National Bank *vs.* Ky., 217 U. S., 443.

main purpose to be conserved is the interest of the Commonwealth, and circumstances might arise or be shown to exist that would authorize different modes of executing it. We have no hesitancy in holding that it is not necessary for the judgment to ascertain and describe the parts of the tract held by occupants. If, at the hearing, it should be made manifest that the title as to certain parts only of the tract would pass to the purchaser under a sale, the statute would be complied with by a sale of the title covering those parts alone. In any event, it is the duty of the court to prescribe what parts thereof shall be sold, if less than the whole is to be sold. Therefore, the judgment appealed from, in so far as it authorizes the commissioner to sell the tract as a whole or in parcels, to suit the purchaser, is erroneous."

As we construe this part of the opinion, it means that it was not necessary in the petition for forfeiture to point out and describe the parts of the tract held by occupants. But from what is said in the latter part of the paragraph just quoted we think that it is apparent that the defendant might show what parts of the land were subject to sale, if less than the whole was to be sold. That is, while in the absence of a showing in this matter, a sale in gross would be ordered, it was nevertheless open for the defendant to show that only a part of the tract, in view of other provisions of the statute, would be subject to sale. With the opportunity to be thus heard, and have a definite ascertainment of the parts to be sold, we think the statute, as construed by the Court of Appeals of Kentucky, does not deprive the defendant of due process of law in this respect.

It is alleged that there was an offer to pay the taxes properly assessable against these lands, notwithstanding which they were declared forfeited; but an inspection of the record shows that such offer was in effect an offer of compromise, not justified by the statute and not in accord with its terms.

The denial of the prayer of the petition involved in case No. 47, because the same did not contain a description of the land sufficient to identify it, which was the basis of the decision of the Kentucky Court of Appeals, presents no Federal question. Whether that petition contained an adequate description was a question for the State to determine in the construction of its own statute. There is nothing to show that the ruling made upon that subject was so arbitrary and baseless as to amount to a deprivation of due process of law.

It is next contended that the statute denies the equal protection of the laws within the meaning of the Fourteenth Amendment, because it does not apply equally upon all the lands in the State. The fact that in its application it can only meet conditions such as are embraced within the law in a part of the counties of the State does not render it obnoxious to the Fourteenth Amendment. *Florida R. R. Co.* v. *Reynolds*, 183 U. S. 471.

This court has frequently held that the State may classify the subjects of taxation, so long as all persons similarly situated are treated alike. *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245. This law applies with equal force to all who are in a condition to come within its terms.

The fact that the plaintiff in error did not acquire the land until after the delinquencies had occurred cannot prevent the operation of the law against it. In such cases the doctrine of innocent purchasers does not apply. *Citizens' Natl. Bank* v. *Kentucky*, 217 U. S. 443.

Another ground of objection under the Federal Constitution is insisted upon in the alleged violation of the Virginia Compact of 1789, embodied in the constitution of Kentucky, and held by this court to be a binding contract between the States. By the seventh section of that compact it is provided:

"SEC. 7. Third, that all private rights and interests of lands within the said district [Kentucky] derived from the

laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed State and shall be determined by the laws now existing in this State."

Section 8 provides that a neglect of cultivation or improvement of any land within either the proposed State or the Commonwealth of Virginia belonging to non-resident citizens of the other, shall not subject such non-residents to forfeiture or other penalty within the term of six years after the admission of the said State (Kentucky) into the Federal Union.

Section 9 provides that no grant of land or land warrant to be issued by the proposed State shall interfere with any warrant theretofore issued from the land office of Virginia, which shall be located on land within the said district, now liable thereto, on or before the first day of September, 1791.

This compact has been the subject of frequent consideration in the courts of Kentucky and more than once in this court.

In the case of *Green* v. *Biddle*, 8 Wheat. 1, the effect of this compact upon certain laws of the State of Kentucky was considered and determined. The case was twice argued, on the first hearing the opinion being given by Mr. Justice Story, and upon rehearing the opinion was given by Mr. Justice Washington. In that case it was held that the seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as they were under the then existing laws of that State, and that laws of the State of Kentucky which undertook to prevent the owner of the land from a recovery thereof, without certain payments to the tenant in possession, impaired the obligation of the contract and were, therefore, null and void.

Under the Kentucky statutes the owner could not recover his property without paying for improvements made by the occupying claimant and making allowances in con-

nection therewith, which it was held had the effect of depriving the true owner of the property vested in him under the laws of Virginia at the time the compact became operative in 1789. "He [the owner] is no more bound," said Mr. Justice Story, "by the laws of Virginia to pay for improvements, which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property, according to the rights and interests secured to him by those laws. It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so changed the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests."

These conclusions were adhered to upon a rehearing and reaffirmed in the opinion of Mr. Justice Washington.

The Virginia compact came again before this court in the case of *Hawkins* v. *Barney's Lessee*, 5 Pet. 457. In that case the validity of a law of Kentucky which undertook to limit the right of bringing suits for the recovery of lands to seven years, instead of twenty, as was the case under the laws of Virginia at the time the compact was made, was sustained. The case of *Green* v. *Biddle* was reviewed, and it was said that, "looking through the course of legislation in Virginia, there was found no principle or precedent to support such laws, the court was induced to pass upon them as laws calculated in effect to annihilate the rights secured by the compact, while they avoided an avowed collision with its literal meaning. But in all their reasoning on the subject they will be found to acknowledge that whatever course of legislation could be sanctioned by the principles and practice of Virginia would be regarded as an unaffected compliance with the compact."

And Mr. Justice Johnson, who spoke for the court in that case, said:

"It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty; nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted, it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign; of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant; while B, his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government."

And the learned judge referred to the language of the eighth article of the compact, recognizing the power of Kentucky to pass similar laws to those which existed in Virginia, after the period of six years; referring to the laws of Virginia, where one who had received a grant of land had failed, at first in three and afterwards in five years, to seat and improve it, and was held to have abandoned it as lapsed and forfeited land, and any one might take out a grant for it.

We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the State of Virginia prior to its date, so as to take away substantial rights incident to the title, as was the case in *Green* v. *Biddle*, *supra*, it did not mean to prevent the State, upon notice and hearing, from requiring the registration of land titles for taxation, or, in

default thereof, from forfeiting such titles to the State. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the State. It was of course recognized that the land would pass under the dominion of a new State, which would require revenues for its support, and while the title obtained from the State of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty and to require their owners, by all proper methods, to contribute their share to the public burdens of the State.

As we have said, many considerations are urged against the policy and justice of this statute, and other objections are made which depend solely upon the laws of the State and their interpretation by the courts of the State. We are unable to find that rights secured by the Federal Constitution were denied by the judgments of the Court of Appeals of Kentucky.

The judgments in each and all of the cases are therefore

Affirmed.